

# Islamic Legal Reform: The Case of Pakistan and Family Law

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## I. INTRODUCTION

*[The petitioner] contracted [his] second marriage without the permission of [first wife] Mst. Mumtaz Bibi. In such a state of affairs her aversion towards him can be well imagined. Obviously the first wife feels an insult if the husband contracts his second marriage. Thus the inception of hatred by Mst. Mumtaz Bibi . . . is a natural conduct which has correctly been given weight by the trial Court. Such conduct of the husband towards the wife certainly breaks her heart if not the bones and when [the] heart is broken it is simply immaterial if the bones are intact.<sup>1</sup>*

The fact that Mumtaz Bibi's husband contracted a second marriage is not particularly unusual, as traditional Muslim family law allows a man to marry up to four wives, provided he treats them equally. A strict application of the relevant codified rule, however, would ordinarily prevent Mumtaz from divorcing her husband on these grounds. The significance of this 1995 Pakistani Appellate Court decision is that the Court provides a rationale—a broken heart—to subvert the rule, despite the fact that polygamy is allowed in the family law civil code.

In fact, Pakistani family law courts displace codified rules everyday, granting women like Mumtaz Bibi divorces where they might not otherwise be allowed under a strict civil law system. Until recently, divorce in Pakistan was solely a husband's right. The appellate court quoted above is only one of many courts that are subverting this norm and expanding women's rights regarding their own marital fate. During the last forty years, judges have been taking on a kind of legislative role in resistance to fundamentalist attempts to limit women's rights; judges are redefining divorce, a woman's right to divorce, and the methods by which she can preserve that right.

Mumtaz Bibi's emancipation reflects the central concern of this article: the erratic but on-going liberalization of Pakistan's divorce law through the creative construction of judge-made common law. The judge's decision in this case took for granted a statutory foundation built in the half century since Pakistan's partition from India in 1947. For the purposes of Pakistani family law, the cornerstone of this foundation lay in the Muslim Family Law Ordinance (MFLO), passed in 1961. The MFLO was a groundbreaking piece of legislation, supported mainly by those who aimed to secure the rights and interests of

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1. Allah Ditta v. Judge, Family Court, 1995 MLD 1852, 1853 (Pak.).

Pakistani women. It was nevertheless a disappointment to many women, as it was merely a compromise between the interests of those who supported a traditional reading of family law and those who were pushing for a modern reading.

These interests clashed on a single, determinative issue: the judicial power of interpretation versus traditional Islamic law as already interpreted by centuries of jurists. Was family law immutable, unchangeable from that which God, the Qur'an, Muhammed, and Islamic jurisprudential scholars had written, or was it malleable to modern needs? In other words, which was to prevail: the codified Islamic law or the common law function of judges to interpret and modify that law through their decisions? As discussed below, a Modernist school of thought advocated the latter, viewing the law as something changeable, vibrant and subject to interpretation. In contrast, Traditionalists upheld the former, viewing Qur'anic precepts of law as the textual and immutable boundaries of Islamic family law jurisprudence.

This work examines this tension between Traditionalists and Modernists within the context of Pakistani family law in general, and within the context of Pakistani divorce law in particular. It suggests that in recent divorce cases, the Pakistani judiciary has habitually strayed from the MFLO and hurdled its compromises—compromises which were a result of an underlying conflict between Modernists and Traditionalists—by using “independent reasoning” to arrive at common law solutions. In effect, the judiciary has shifted family law, and continues to shift it, from the realm of Islamic civil law (the MFLO) to that of the common law, advancing the Modernist agenda and promoting the interests of women.

This conclusion is reached in four steps. Part II of this paper is an overview of classic Islamic legal theory—a necessary discussion that both defines important terms and illustrates the complexity of the theory. The focus in this section is on *Ijtihad*, or the method of independent reasoning and interpretation permitted by Islamic legal theory. As argued below, an ideological rift regarding the scope of *Ijtihad*—and the judicial and theological actors who are entitled to employ it—serves as the defining characteristic of Pakistani family law. Specifically, disputes about the definition of *Ijtihad* serve as the centerpoint of the conflict between those who seek to emphasize the law's vibrancy and changeability (the Modernists) and those who regard the law as unchanging and immutable (the Traditionalists).

Part III explores the sources of this tension regarding the scope of *Ijtihad*. It is initially suggested that the complexity of Islamic legal theory and the variation in legal practices compelled British colonizers in Pakistan to essentialize and reduce the law. As a result, the British indirectly reinforced the Traditionalist viewpoint; the Muslims themselves came to believe that, in general terms, their law was immutable, or, in the language of theory, that the “gate of *Ijtihad* had closed.” It is subsequently suggested, however, that in the area of Islamic family law in particular, the British left the question of *Ijtihad* unanswered: although the

British codified family law practices, reinforcing their unchangeability, where certain practices offended British sensibilities the colonizers implemented legislation, substantively modifying the law and reinforcing its changeability.

Part IV examines the contemporary implications of this legacy of uncertainty. The discussion focuses on the legislative centerpiece of Pakistani family law: the MFLO. It argues, first, that the historical record specific to the MFLO—comprised largely of the Report produced by the 1955 Marriage Commission established to examine the state of Pakistani family law—reveals that the struggle between Modernists and Traditionalists over the scope of *Ijtihad* was alive and well after British departure. Second, and perhaps more importantly, this struggle ensured that the MFLO would be a child of compromise. It would strike a balance between the interests of those who supported a traditional reading of family law and those who sought genuine and substantive reforms for Pakistani women. This balance is evidenced in Part IV by a detailed examination of the MFLO's provisions for marriage registration and polygamy.

Part V brings us to the present day. An examination of recent decisions in divorce cases suggests that secular judges in Pakistan have attempted to tip the balance struck by the MFLO in favor of those who seek reform. Specifically, the courts have tipped the balance in favor of an expansive interpretation of the scope and application of *Ijtihad*; they have employed independent legal reasoning in a variety of cases to reach “just” (if inconsistent) results. In doing so, the courts have strayed from the MFLO and shifted family law from the realm of the civil to that of the common law. Evidence for this trend—as well as counter-trends which result from continued compromises between Modernist and Traditionalist factions within the Pakistani judiciary—is furnished in Part V from cases addressing the two bulwarks of Islamic divorce law: *talaq* and *khula'*.

Under Islamic law, *talaq* is a husband's right to unilaterally pronounce himself divorced from his wife, and the legal validity of this pronouncement centers on the issue of notice. Part V argues that in determining whether adequate notice of *talaq* is furnished in a particular case, secular courts have looked not to the MFLO, nor to traditional Islamic law, but to *Ijtihad*; in *talaq* cases, the courts have effectively exercised their own judgment, with a view toward advancing the status and rights of Pakistani women. Likewise, in cases regarding *khula'*—an offer of consideration made by a wife to her husband in exchange for his consent to a divorce—the courts have resorted to *Ijtihad* in order to lower the thresholds of proof, to broaden the circumstances legally relevant to the exercise of *khula'*, and to secure the rights and interests of the female parties to the litigation.

In effect, Part V demonstrates that judges have created a legal regime for divorce which strikes a compromise between the Western no-fault divorce system and the Islamic tradition: women may be granted divorces under *khula'*—an “incompatibility” theory—merely by articulating their “hatred” for their husbands and their inability to live as “man and wife,” although they must

give financial consideration to their husbands in return. This "hate standard," and its low threshold of proof (the mere articulation of the words "I hate him") suggests the new doctrine of divorce is inching towards a no-fault doctrine. Perhaps more importantly, the courts' jurisprudence suggests that Pakistani divorce law is not as medieval as many have described it.

To that end, this work illuminates the methods employed by the judiciary to tackle the inequality of women in Pakistani society. It also serves as an indirect attempt to counter popular Western beliefs about gender and power in the Muslim world. This is perhaps the first time that substantial pieces of Pakistani family law are quoted, let alone included, in Western legal exposition. This inclusion is crucial to demystifying the Islamic world and correcting our misperceptions about efforts (or the lack thereof) at reform from within that world.

## II. CLASSICAL ISLAMIC LEGAL THEORY

This section offers a brief, schematic look at the Islamic legal system and its theory. To that end, the main elements of the theory are outlined, as well as the definitions of some important terms. In addition, *Ijtihad*, or "independent reasoning," is given special treatment, as it is this part of the theory that is the subject of debate in Pakistani family law politics.

### A. The Basic Elements and Definitions

*Usul-al-Fiqh* are the sources of the law and the principles of jurisprudence—in other words, legal theory. Under the theory, there are four acceptable sources of law. Thus, there are four places to look for the answer to a legal question. The first and second sources of law are the Qur'an and the Sunna. The Qur'an, the Islamic holy book, is the central source of and foundation for Islamic law. In addition, and of almost equal importance, are the Sunna, which are the sayings and doings of the Prophet Muhammed—in other words, normative custom.<sup>2</sup>

The Qur'an and Sunna are obvious places to look for legal answers, though they are not "codes" of law comparable to Western civil codes. The main purpose of Islamic legal theory has been to formulate rulings concerning cases whose solutions are not stated in the Qur'an or the Sunna.<sup>3</sup> Where it is perceived that the Qur'an and Sunna fail to answer a legal question, jurisprudential scholars, or *Mujtahids*, have filled in the blanks.

These scholars use the established principles of *Ijtihad*, or the science of independent reasoning and interpretation. *Ijtihad* is reached primarily through consensus among scholars and, upon failing that route, through legal reasoning. Early in Islamic history, scholars from different regions often disagreed on issues in their *Ijtihad*, and eventually hundreds of schools of *Ijtihad* developed. Thus,

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2. The words "Sunna" and "Hadith" are often used interchangeably.

3. WAEL B. HALLAQ, A HISTORY OF ISLAMIC LEGAL THEORIES 2 (1997).

the main reason for the schools' original separate existence was geographical.<sup>4</sup> Each school was suited to its own community's culture, "with its attendant customs and traditions."<sup>5</sup> Only *Mujtahids* were considered qualified to engage in *Ijtihad*.

The jurist [must have] knowledge of the Arabic language, of the legal contents of the Book, of its particular and general language, and of the theory of abrogation. The jurist must be able to employ the *Surma* in interpreting those Qur'anic verses that are equivocal, and in the absence of a *Surma* he must be aware of the existence of a consensus which might inform the case at hand.<sup>6</sup>

Historians and Islamic scholars, studying the development of Islamic legal theory, debate over whether the search for legal rules through the four sources mentioned above—Qur'anic reading, reference to the Sunna, consensus, and independent reasoning, had been exhausted at the end of the tenth century. The question of whether independent legal reasoning did cease at the end of the tenth century can perhaps only be answered by a chronological study of all jurists' writings—arguably an impossible endeavor.<sup>7</sup>

For example, some scholars argue the Islamic legal system became static, and that the growth of jurisprudence and the discovery or creation of new legal rules came to a halt in the tenth century. The supposed end of creative jurisprudence is known as "the closing of the door of *Ijtihad*."<sup>8</sup> The doctrine of *Ijtihad*, or independent reasoning, was replaced by that of *taqlid*, or imitation. But many others scholars disagree, arguing that in fact the gate of *Ijtihad* never closed. Across Muslim communities, jurists and judges were not merely

4. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 57 (1964).

5. Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 7 (1997).

6. HALLAQ, *supra* note 3, at 24.

7. Some scholars, such as Wael B. Hallaq, think that *Ijtihad*'s historical progress evidences developments in the Islamic legal system. See generally HALLAQ, *supra* note 3.

8. N.J. COULSON, A HISTORY OF ISLAMIC LAW 80 (1978). Coulson writes:

Henceforth every jurist was an "imitator," bound to accept and follow the doctrine established by his predecessors. . . . The point had been reached where the material sources of the divine will—their content now finally determined—had been fully exploited. . . . Thus circumscribed and fettered by the principle of *taqlid*, jurisprudential activities were henceforth confined to the elaboration and detailed analysis of established rules. From the tenth century onwards the role of jurists was that of commentators upon the works of the past masters. . . . [B]y the tenth century the growth and maturity of the theory of the four *usul* . . . had produced an attitude of doctrinaire isolationism.

*Id.* at 80-82.

According to Coulson, Islamic law was immutable after the tenth century, as it did not evolve out of society; rather, law preceded and molded society. Likewise, Joseph Schacht wrote:

About 900 A.D., however, the point had been reached when the scholars of all schools felt that all essential questions had been thoroughly discussed and finally settled, and a consensus gradually established itself to the effect that from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law, and that all future activity would have to be confined to the explanation, application, and at the most, interpretation of the doctrine as it had been laid down once and for all.

SCHACHT, *supra* note 4, at 70-71.

referring to prior decisions, scholarship, or textual sources, but instead were using and continue to use their own independent reasoning in deciding questions of law, paying attention to local custom.<sup>9</sup>

Jurisprudential scholarship, if in agreement, is known collectively as consensus, or *ijma*. *Ijma* is the third source of law under Islamic legal theory. It is the sanctioning instrument "whereby the creative jurists, the *Mujtahids*, representing the community at large, are considered to have reached an agreement, know retrospectively, on a technical legal ruling, thereby rendering it as conclusive and as epistemologically certain as any verse of the Qur'an and the Sunna of the Prophet."<sup>10</sup> *Ijma* does not in practice require a true consensus of all scholars in an area; sometimes merely the meeting of two *Mujtahids*' minds will suffice. Like the Qur'an or Sunna, *ijma* is a textual basis for arriving at a legal rule, as it requires a jurist to read and rely on what previous legal scholars have written.

The process of reasoning is known as *qiyas*, or analogy, and it is this reasoning that represents the fourth source of law after the Qur'an, the Sunna, and *ijma*.<sup>11</sup> Most rules were based on analogy, because the textual rules were so few and limited. *Mujtahids*, upon reaching a ruling through "human reasoning" rather than the more traditional textual sources of law (Qur'an, Sunna, consensus), could give that ruling the same legitimacy as a rule reached through a textual rationale by their agreement on its validity.<sup>12</sup> Thus human reasoning was often part of the larger process of *ijma*, or consensus.

*Mujtahids* used varying forms of *Ijtihad*, placing different levels of importance on the Qur'an, the Sunna, *ijma*, and *qiyas*. Muslims were able to seek out "the school of jurisprudence they found most convincing and follow its guidance."<sup>13</sup> Today, only four central schools of jurisprudence currently remain, however: Hanafi, Maliki, Hanbali, and Shafi'i. Most countries have adopted one particular school's *Ijtihad* and follow its theory of interpretation as the basis of their family laws.

## B. *Ijtihad: the Case of Pakistan*

*It is difficult for the Occidental observer to understand the sense of religious discipline which the Pakistani Muslim feels for the Islamic family laws. The divine gift provides the perfect social order, and any earthly interference is deeply resented as an attempt to undermine the personal and spiritual values of the individual.*<sup>14</sup>

9. See Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT'L. J. MIDDLE EAST STUD. 3 (1984); See also Baber Johansen, *Legal Literature and the Problem of Change: The Case of the Land Rent*, in ISLAM AND PUBLIC LAWS 29 (Chibli Mallat ed. 1993).

10. Johansen, *supra* note 9, at 1.

11. *Id.*

12. *Id.*

13. al-Hibri, *supra* note 5, at 6.

14. David Pearl, *Family Law in Pakistan*, 9 J. FAM. L. 165, 168 (1969).

The “social order” of which David Pearl writes is Hanafi law. As noted above, Hanafi doctrine is one of the four remaining central doctrinal groups of Islamic law and it is the prevalent legal doctrine in Pakistan. Under the Hanafi doctrine, the Gate of *Ijtihad* was arguably never closed, since unfettered use of personal opinion continued to be recognized as legitimate by the Hanafis, but only where some other method of arriving at a rule would have led to undesirable results.

Indeed, as Pearl suggests, some groups deeply resent any interference with that social order, even from within the social order. Pakistani Traditionalists believe that legislation can only be divinely ordained. That is, valid legislation is that which was laid out in the Qur’an (Islam’s holy book) and the Sunna (the Prophet Muhammad’s actions and sayings), or as a result of consensus, or *ijma*, as a last resort. As a consequence, application of and interpretation of that legislation, *Ijtihad*, has traditionally been limited to religious leaders who were invested in the maintenance of a conservative society.

Pakistani Modernists, in reaction to Traditionalists, are pushing for a definition of legislative and judicial power that would include the efforts of earthly beings, not merely those of the divine. Modernists argue it is within humans’ power to create, modify, or enforce laws. For example, as will be covered below, the Marriage Commission, a Modernist project, reshaped the common law structure.<sup>15</sup> The Commission specifically claimed in its Report that independent legal reasoning, or *Ijtihad*, and the subsequent interpretation and application of family laws (both in the Qur’an and Sunna and later, in the Muslim Family Law Ordinance), while formerly limited to *Mujtahids*, was in fact an endeavor that any secular judge could participate in. Indeed, any man or woman might be able to engage in *Ijtihad*.<sup>16</sup>

In the process of broadening the scope of *Ijtihad*, the Modernists were introducing a new kind of separation of powers: whereas *Mujtahids* had historically both created and applied religious law, the Modernists envisioned separate legislative and judicial functions. In addition, the judiciary would not be limited to scholars trained in Islamic law who would apply the code mechanically. Instead, the judiciary would include secularly trained judges who could and would interpret and apply the code and common law in tandem, and on a case by case basis.

As a result, much of the Traditionalist resistance to the Modernists focuses on the definition of *Ijtihad* and on the qualifications of those who can practice it. The real problem is the two different ends each group has in mind, not the two different means they each claim to support. The Modernists want social justice as a result of the structural change. The Traditionalists want to limit the scope of independent legal reasoning in order to avoid Western cultural imperialism.

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15. *Infra*, note 44 and accompanying text.

16. THE REPORT OF THE COMMISSION ON MARRIAGE AND FAMILY LAWS (1956), reprinted in STUDIES IN THE FAMILY LAWS OF ISLAM 39 (Khurshid Ahmed ed., 1959) [hereinafter THE REPORT].

As is explored in Part V, the judiciary is currently carrying out the Modernists' agenda for "social justice," an agenda which they are attempting to achieve through independent legal reasoning. Pakistani judges have taken advantage of the push for broadening the scope of their powers, resulting in a new kind of divorce law that is Islamic in flavor but Western in practice. In creating this new kind of law, judges have both referred to the Muslim Family Law Ordinance and have engaged in *Ijtihad* where the civil law system may result in social injustice. Pushing beyond the limits previously imposed upon them, judges have consequently interpreted the family code and "Islamic law" on a case by case basis, thereby creating a substantive common law within the family law regime.

### III. THE BRITISH COLONIAL ENCOUNTER IN THE INDIAN SUBCONTINENT

Identity politics were a rallying point around which the autonomous Pakistani state was created in 1947. The Muslim League, led by Muhammed Ali Jinnah, had initially formed in the 1930's as a lobby for separate Muslim electorate seats in India's Hindu Congress. However, it soon pressed for a separate state, convinced that the Congress would continue to treat Muslims as second-class citizens, favor pro-Hindu legislation, and encourage the creation of employment opportunities exclusively for Hindus.

The separation of Pakistan from India in 1947 did not happen between Pakistanis and Indians, but more accurately between Muslims and Hindus, because the conflicts between them were not only political and religious, but cultural and social as well. The state had formed as a "logical" outcome of Muslim-Hindu politics, and by 1947 the semiotics of "Islam" served as markers for self-definition. In a community historically excluded from Indian/Hindu politics, separatists hoped Islam might be a set of spiritual beliefs serving only as an initial and temporary proxy for patriotic sentiment that would later develop into a nationalist fervor. Instead, the art of defining oneself in contrast to others blossomed, and an "Islamic" identity became a fixed proxy for national identity.

It is equally important to understand that in addition to separatist rhetoric, British occupation of the Indian subcontinent was also a catalyst for identity politics. The British treated Muslims and Hindus as distinct legal groups, separating their legal claims into two kinds of colonial courts, and amalgamating a corpus of religious legal codes for each group.

Thus British occupation of the Indian subcontinent was of great significance in the development of what is currently known as "Islamic law." The British intervention was central to the creation and propagation of the idea that Islamic law is textually based and thus fixed and immutable. While Islamic law was once varied and subject to local custom and "independent reasoning," or *Ijtihad*, it is now the subject of a great debate concerning its immunity from any independent reasoning.



*A. The British Colonial Impact on Muslim Law*

Muslim-Hindu politics were not the only catalyst for the creation of a “Muslim” identity. The British colonial presence, too, played a crucial role in creating and enforcing that identity. The various Muslim communities in India traditionally practiced the application of Muslim law differently, as local custom had been an important influence on decision-making. *Qadis*, or religious judges, and successors to the *Mujtahids* of earlier centuries, took local custom into consideration when applying the law. Essentially, the *qadis* were interpreting the law using primarily independent reasoning—a liberal practice of *Ijtihad*—and then doing precisely what Modernists argue for today. The British introduced a political institution, however, that would alter the legal system: the colonial courts. This new system of courts was an important part of their administration, as it served as a central method of “maintain[ing] effective political control with minimal military involvement.”<sup>17</sup>

The colonial court nonetheless required considerable intellectual and administrative effort, if not effort of the military sort, since English judges unfamiliar with Muslim law nevertheless had to apply that law in colonial courts. To simplify and facilitate their task, the British found it necessary to create a more static and fixed Muslim law.

The colonial power molded what had been a fluid, uncoded, inconsistent, yet completely workable practice of Islamic law into a fixed set of Islamic rules for ease of application by the new English/Muslim courts. First, the British mistook the Qur’an and the Sunna for codes of law and applied those “rules” without consideration of either the social circumstances in which the texts were written or the circumstances in which they were now being applied.<sup>18</sup> Second, the British translated only certain Islamic texts into English. The Hastings Plan of 1772, a British roadmap for colonial administration, asked that *al-Hidaya*, a compilation of Hanafi doctrine, be translated from the Arabic into Persian, and then into English. As only a few additional texts were eventually translated, those texts became part of the authoritative Muslim codes rather than retaining minimal importance as “discrete statements within a larger spectrum of scholarly debate.”<sup>19</sup> Third, the British basically disregarded regional customs, especially if it made uniform application of the codes difficult.<sup>20</sup>

Michael R. Anderson outlines the British role in creating a code of supposedly “Muslim” law.<sup>21</sup> One result of the codification of this supposed “Islamic law” was the false assumption that the law was immutable. Another result was the essentialization of different legal systems and the subsequent creation of strong political identities shaped by religion. Under the Hastings

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17. Michael R. Anderson, *Islamic Law and the Colonial Encounter in British India*, in ISLAMIC FAMILY LAW 205, 206 (Chibli Mallat & Jane Connors eds., 1990) (citations omitted).

18. *Id.* at 212.

19. *Id.* at 214.

20. *Id.* at 215.

21. *Id.* at 205.

Plan, subcontinental peoples were divided into categories: Hindu and Muslim. As a result "the category of 'Muslim' . . . took on a new fixity and certainty that had previously been uncommon."<sup>22</sup> By ignoring different Muslim groups' legal practices and imposing a centralized, codified Islamic law, the British unwittingly created the basis for organized political struggle both between Hindus and Muslims and between those groups and the British. That political struggle would culminate in an unceremonious British exit in 1947 as well as Pakistani partition from India in the same year.

Most importantly, however, this newer, stronger Muslim group identity began to absorb the new British-imposed, scripturally-based form of judicial decision making. The Muslims' collective consciousness formed and took hold of that jurisprudential trend, and today we see that the fight over family law doctrine turns on that very question of what exactly Islamic law is: an immutable, textual law, or a changeable law open to "independent reasoning" of the sort that *qadis* were applying long before British intervention.

#### *B. The British Colonial Impact on Muslim Family Law in Particular*

British influence in commercially related areas of the law, such as contracts and torts, was an undeniable product of the British need to facilitate extraction of economic benefit from the region. However, while the British did alter the form of judicial decision-making through the creation of codes, which resulted in textually dependent form of Islamic law, it did not interfere with the content of personal law. "Muslim family law was the field which was least touched by British Indian legislature, while other branches of law like criminal law, the law of evidence, the law of transfer of property and the law of contract were replaced by modern laws of British origin."<sup>23</sup> In the field of family law, a significant departure from tradition was the adoption of the case law system of legally binding precedents (though it was also introduced to all areas of law) that continued after 1947.<sup>24</sup>

A second significant modification to family law was the adoption of certain pieces of legislation. The colonial power interfered legislatively where it found certain family law practices offensive to British values. The more important changes to Muslim family law included those to paternity, widowhood, marriage, and divorce. These changes were legislative attempts to improve women's lives by creating rules outside the Qur'an's four corners. The British advanced the Traditionalist agenda by laying the foundations for an ideology of codified and immutable law. Ironically, the British also advanced the Modernist agenda by modifying and codifying rules that were ostensibly helpful to women's rights. The move towards human legislative power had begun,

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22. *Id.* at 220.

23. RUBYA MEHDI, *THE ISLAMIZATION OF THE LAW IN PAKISTAN* 158 (1994).

24. KHAWAR MUMTAZ & FARIDA SHAHEED, *WOMEN IN PAKISTAN* 37 (1982) (citing Sir Abdur Rahim, *PRINCIPLES OF MUHAMMADAN JURISPRUDENCE* 34 (1982)).

exacerbating the tension between Modernists and Traditionalists. Three examples of pre-partition legislation follow.

Classical Hanafi law set the waiting period at 90 years from a husband's date of birth before a woman could be considered a widow and therefore eligible for remarriage.<sup>25</sup> The Indian Evidence Act of 1872 established that after a husband's seven-year absence, a court may issue a decree of his death and declare putative widowhood.<sup>26</sup>

In 1929, the Child Marriage Restraint Act established minimum marital ages: 16 for girls and 18 years for boys. The Act also provided for penalties for any male over 21 years who married a child or for a parent or guardian who "promotes, permits, or fails to prevent" such a marriage. Courts were also empowered to issue an injunction against such a marriage.<sup>27</sup>

In 1939, the Dissolution of Muslim Marriages Act sought to grant women the right to improve their status and to obtain judicial relief. The Act established that women could obtain a divorce if they could prove fault -that is, that their husbands met one of eight grounds provided by the Dissolution of Marriages Act (DMA).<sup>28</sup> John Esposito writes, "Ostensibly the Act intended to ... consolidate and clarify the provisions of Muslim Law relating to suits for dissolution of marriage by women" but actually its purpose was to grant women rights not recognized under the Hanafi law that subcontinental courts followed.<sup>29</sup> The legislators wrote in explanation of their law:

There is no provision in the Hanafi Code of Muslim Law enabling a married Muslim woman to obtain a decree from the Courts dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. Legislation, then,

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25. John Esposito, *Muslim Family Law Reform in Pakistan*, 4 J. MALAY. COMP. L. 293, 294 (1977).

26. *Id.* at 294.

27. *Id.* at 294-95.

28. Dissolution of Muslim Marriages Act, 1939, reprinted in MUMTAZ & SHAHEED, *supra* note 24. ("(1) The husband's whereabouts have not been known for four years. (2) The husband has neglected or failed to provide maintenance for two years. (3) The husband has been sentenced to imprisonment for seven or more years. (4) The husband has failed to perform marital obligations for three years without reasonable cause. (5) The husband was impotent at the time of marriage and continues to be so. (6) The husband has been insane for two years or has leprosy or a virulent venereal disease. (7) The wife, having been given in marriage by her father or guardian before she attained the age of fifteen years [changed to sixteen years by the MFLO] repudiated the marriage before reaching the age of eighteen years, provided that the marriage has not been consummated. (8) The husband treats her with cruelty, that is to say: (a) habitually assaults her or makes her life miserable by cruelty of conduct, even such conduct does not amount to physical ill treatment, or (b) associates with women of evil repute or leads an infamous life, or (c) attempts to force her to lead an immoral life, or (d) disposes of her property or prevents her from exercising her legal rights over it, or (e) obstructs her in the observance of her religious profession or practice, or (or if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qur'an.")

29. Esposito, *supra* note 25, at 295.

became necessary in order to relieve the sufferings of countless Muslim women.<sup>30</sup>

In implementing this legislation, the colonial power was contributing to a paradigm in which family law is not solely divine, but in which real and substantive legal change could be molded by human hands.

Therefore, the British had made changes in family law that sent out mixed signals to Muslims. On the one hand, the British codified the family laws, refraining from impeding on traditional Hanafi doctrine. This was a move towards suggesting Islamic law's immutability. On the other hand, where British sensibilities were offended, the British introduced legislation concerning marriage, remarriage, and divorce, which sought to "improve" women's lives by altering Hanafi doctrine. This move suggested the law's flexible nature. The British helped to create the current tension between Modernists and Traditionalists, and each group can look back at the British example for support their respective agendas, as different as those may be.

#### IV. THE LAST 53 YEARS: REFORMS IN FAMILY LAW

In the initial years of its post-colonial existence, Pakistan's sense of security waned due to both external and internal forces. Externally, the conflict with India over the territory of Kashmir and the threat posed by the USSR as India's ally made Pakistan habitually look over its shoulder. Internally, ethnic conflict between Muslims and the minority population of Hindus (who remained despite partition) created an atmosphere in which violence had been and continued to be a constant threat. Specifically, crimes against women committed by Hindus during partition, namely rape and abduction, "made a fetish of safeguarding female honour."<sup>31</sup>

As the struggles for national identity and national security continued, successive governments used women as symbols of the Islamic state. Today, the struggles over family law reforms are, in part, battles between those who continue to promote women not as individuals but as national "Islamic" symbols and wish to interpret Islamic law accordingly, and those who wish to interpret law more liberally, viewing women not as symbols but as individuals in the tradition of legal liberalism.

The most significant reform to Pakistan's family law in the last fifty-three years has been the Muslim Family Law Ordinance of 1961, written in response to the Marriage Commission Report of 1956. This section addresses the central groups responsible for the Ordinance's promulgation, the tensions and arguments between Modernists and Traditionalists over the Report and the subsequent Ordinance, and the Ordinance's effectiveness.

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30. Esposito, *supra* note 25, at 295 (quoting The Dissolution of Muslim Marriages Act at Preamble).

31. Ayesha Jalal, *The Convenience of Subservience: Pakistan, in WOMEN, ISLAM, AND THE STATE* 85 (Deniz Kandiyoti ed., 1991).

A. *The Spectrum of Players: Secularists, Modernists, Traditionalists, Ulema*

A discussion of the Marriage Commission's Report and the Muslim Family Law Ordinance must begin with a brief delineation of the players when the Marriage Commission wrote its Report in 1956, and at the time when the legislature wrote the MFLO in 1961. Each of the four main groups—Secularists, Modernists, Traditionalists, and *Ulema*—held (and continues to hold) its own position on legal interpretation and application.

The Secularists sat at one end of the religious and political spectrum, believing in a complete separation of church and state. Secularists wanted to introduce a "secular state on the Western pattern, with a territorial regime of law."<sup>32</sup> At the other end of the spectrum sat the *Ulema*, or the orthodox religious leaders, who held the extreme right-wing point of view.<sup>33</sup> These two extreme positions were held by relatively small groups; between them were the much more numerous, visible, and politically powerful Modernists and Traditionalists.

The Modernists sought to institute legal reforms while remaining within the traditional legal regime of *Ijtihad*—independent judgment on a legal question that would naturally allow for a more liberal interpretation of law based on the specific facts at hand. Crucially, they wanted the judicial branch to be able use *Ijtihad* as "an instrument whereby the social and economic factors can influence a change in the laws of Islam."<sup>34</sup> In essence, Modernists believed that *Ijtihad* could be a viable "modern" legal method by which the legislature and the judiciary could, if necessary, achieve "social justice"—that is, alter certain laws, traditions, and religious precepts that the Traditionalists might consider unalterable. And, radically, the Modernists suggested that anyone, including secular Family Court judges, could practice *Ijtihad*. *Ijtihad* no longer belonged to *ulema*, *Mujtahids*, or *qadis* trained in Islamic law.

The Traditionalists, led by the right-wing religious leader Abul A'la Maududi, developed the thesis that the "unalterable parts of the Qur'an and the *Sunnah* must serve as the foundation of the Islamic faith." Maududi's writings suggest that he understood that Islamic laws, though divine in origin, could be altered if absolutely necessary, but those alterations had to take shape within the classical legal framework. For Maududi, *Ijtihad* (independent but disciplined judgment), *qiyas* (analogous reasoning), and consensus (agreement among judges) must be performed only by Islamic scholars.

The essential difference between the two groups lay "not so much in any violent disagreement over the sources of Islamic law as in the respective approach to these sources."<sup>35</sup> Maududi would only permit the exercise of *Ijtihad* within the discipline of the unalterable laws of Islam, and only by religiously

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32. Pearl, *supra* note 14, at 168.

33. *Id.* at 166.

34. *Id.* at 167.

35. *Id.*

trained jurists. In contrast, Modernists would allow secular judges to use *Ijtihad* as an instrument for change, taking into account the social and economic realities,<sup>36</sup> and decide on a case by case basis whether to apply civil law or use their own judgment to arrive at social justice.

The dramatic struggle between the two groups over the definition and use of *Ijtihad* seems to have been the primary reason for the Muslim Family Law Ordinance's failure as a serious tool for change. As we will see, the arguments on each side may have been a religious curtain behind which lay broader social agendas. The Modernists' agenda was social justice; the Traditionalists' agenda was to keep what they felt were Western imperialist influences at bay and to assure the continuation of their own positions of power and authority in the community. The Traditionalists' aversion for Western influences may have only been rhetoric, but it was a position to which they staunchly adhered:

Do we want to adopt the Western culture or the Islamic culture? . . . Our abhorrence for Western culture is not the product of any prejudice. We feel that Western culture is unsuited to our needs and conditions. We have our own culture and our own traditions and conventions. . . . We also hold that Western culture has failed to establish a good moral society in the Occident itself. The free mingling of the two sexes has proved a curse for human civilisation. . . . Law has an importance of its own, but it must be applied after other factors of reform have been properly used and harnessed.<sup>37</sup>

It is hard to say whether the Traditionalist line is an authentic expression of the group's beliefs or, according to a common feminist critique, if it is merely an excuse for continued male domination and patriarchy.

### *B. Post-Partition's Early Efforts at Reform*

While the Modernists and Traditionalists were beginning to flesh out their arguments for and against the liberal use of *Ijtihad*, respectively, the 1940s and 1950s saw the simultaneous creation of women's groups that might have been true forces for change in family law. However, their membership and leadership were limited to "bourgeois elements."<sup>38</sup> Their involvement in political or social issues was often merely the result of their relationships as wives, mothers, or daughters to men involved in political action (including the judiciary). Although dedicated to social welfare, the groups were complacent and did not threaten the establishment for three important reasons: the groups' own demographic

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36. *Id.*

37. Khurshid Ahmed, *Introduction*, in *STUDIES IN THE FAMILY LAW OF ISLAM*, 1, 7-9 (Khurshid Ahmed ed., 1959).

38. Shahnaz Rouse, *Women's Movements in Contemporary Pakistan: Results and Prospects*, WORKING PAPER #74, WOMEN IN INTERNATIONAL DEVELOPMENT 6 (1984)

composition, the targeted demographic sectors, and the issues they chose to tackle.

The All-Pakistan Women's Association (APWA) was the largest and most well-known organization and provides an example of the group's ineffective push for reform for the reasons listed above. Led by Begum Liaquat Ali Khan, wife of a significant political leader, its members were literate, educated, wealthy, and well-connected. The APWA provided relief during emergencies, took care of orphans, created an APWA college in Lahore, and set up a few vocational training centers.<sup>39</sup> APWA's approach was reactive, reformist, and corrective. Ayesha Jalal writes, "The extensive publicity given to APWA is an indication of the state's eagerness to support women's rights activists willing to work within prescribed limits."<sup>40</sup> The state's support of the APWA (given its class composition) was a way to ensure that women's resistance would not embarrass or seriously challenge the state. Moreover, the government could quell other groups whose creation seemed incipient.

As a result, other groups created during this period shared the same problems as the APWA.<sup>41</sup> These organizations, including the Family Planning Association of Pakistan, the Pakistan Child Welfare Council, and the Housewives Association, were started by Pakistani women who did not want to join the women apologists of Islam. Refusing to support the proposition that "there was nothing fundamentally wrong with Qur'anic prescriptions for women," these new organizations' leaders argued that the problem lay in the *misapplication* of those prescriptions.<sup>42</sup>

### C. *The Ordinance's Origins: The Marriage Commission and Its Report of 1956*

Between partition, in 1947, and 1954, Pakistan's family law did not undergo any reform.<sup>43</sup> Then, in August of 1955, under pressure from women's groups such as the APWA, the government appointed a seven-member commission ("Commission") to study the existing laws of marriage, divorce, and family maintenance and to make recommendations for reform.

The Commission was composed of six Modernists (three men and three women) and one Traditionalist religious scholar, Maulana Ihteshamul Haq.<sup>44</sup> The Commission composed a questionnaire, issued thousands to the public, and urged citizens to respond in order that the Commission might fashion its recommendations in accordance with public opinion. It may be important to note that those who were literate, and therefore able to respond, were perhaps more socially and politically liberal than the average Pakistani, and were perhaps more

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39. *Id.* at 6-7.

40. Jalal, *supra* note 31, at 90.

41. See MUMTAZ, *supra* note 28, at 54.

42. Jalal, *supra* note 31, at 92.

43. MEHDI, *supra* note 23, at 157.

44. FREELAND ABBOTT, ISLAM AND PAKISTAN 198 (1968)

sympathetic to the Modernist cause. As a result, the questionnaires might have given the Commission the mandate for a Modernist agenda it was seeking.

Maulana Haq submitted a dissenting note ("Dissent") along with the Commission's report ("Report"), presenting an orthodox view on family matters.<sup>45</sup> The Report and the Dissent highlighted the conflicting views that dominated the politics of family law. In any case, many of the Commission's recommendations were not even incorporated into the Muslim Family Law Ordinance (MFLO), as legislators tried to strike a balance between Modernist and Traditionalist interests.<sup>46</sup> This compromise is covered in the next section.

1. *The Report: An Attempt to Redefine Ijtihad, Move Away from Divine, Immutable Legislation and Make Room for Human, Flexible Legislation*

The Commission introduced its Report in an attempt to answer the following question: Do the existing laws governing marriage, divorce, maintenance and the other ancillary matters among Muslims require modification in order to give women their proper place in society according to the fundamentals of Islam? The Commission wrote in response:

So [far] as the Holy Book is concerned the laws and injunctions promulgated therein deal mostly with basic principles and vital problems and consist of answers to the questions that arose while the Book was being revealed. The entire set of injunctions in the Holy Qur'an covers only a few pages. It was the privilege of the Holy Prophet to explain, clarify, amplify and adapt the basic principles to the changing circumstances and the occasions that arose during his life-time. His precepts, his example and his interpretation or amplification constitute what is called *Sunnah*. As nobody can comprehend the infinite variety of human relations for all occasions and for all epochs, *the Prophet of Islam left a very large sphere free for legislative enactments and judicial decisions even for his contemporaries who had the Holy Qur'an and the Sunnah before their eyes*. This is the principle of *Ijtihad* or interpretative intelligence working within the broad framework of the Qur'an and the *Sunnah*.<sup>47</sup>

In this passage, the Commission carved out an area of the law that could be left to human hands to shape. Specifically, the Commission redefined *Ijtihad* as independent judgment on a legal question. The Commission painted *Ijtihad* as a dynamic principle—dynamic in its ability to change with the times—that distinguished Islam from other religions, a principle that found its "dynamic" mandate in the Qur'an and *Sunnah*.

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45. MEHDI, *supra* note 23, at 157.

46. *Id.*

47. THE REPORT, *supra* note 16, at 39 (emphasis added).



Interestingly, in trying to show that independent legal reasoning on a case-by-case basis was a valid approach to family law, the Commission itself did not engage in independent reasoning or logic free of religious influences, but instead relied on an Islamic legal scholar's writings. The Commission cited philosopher and Islamic revivalist Iqbal (not a Modernist but instead a reactionary calling for the return of fundamentalism), relying on his criticism of the approach to legal thought that limited *Ijtihad* to reliance on the established schools of thought. Iqbal wrote:

The word (*Ijtihad*) literally means to exert. In the terminology of Islamic law it means to exert with a view to form an independent judgment on a legal question. The idea, I believe, has its origin in a well-known verse of the Qur'an—'And to those who exert We show Our path.' We find it more definitely outlined in a tradition of the Holy Prophet. When Ma'adh was appointed ruler of Yemen, the Prophet is reported to have asked him as to how he would decide matters coming up before him. 'I will judge matters according to the book of God,' said Ma'adh. 'But if the Book of God contains nothing to guide you?' 'Then I will act on the precedents of the Prophet of God.' 'But if the precedents fail?' 'Then I will exert to form my own judgment.' The student of the history of Islam, however, is well aware that with the political expansion of Islam systematic legal thought became an absolute necessity, and our early doctors of law, both of Arabian and non-Arabian descent, worked ceaselessly until all the accumulated wealth of legal thought found a final expression in our recognised schools of law. These schools of law recognize three degrees of *Ijtihad*: (1) complete authority in legislation which practically confined to the founders of schools, (2) relative authority which is to be exercised within the limits of a particular school, and (3) special authority which relates to the determining of the law applicable to a particular case left undetermined by the founders.<sup>48</sup>

Iqbal argued for a freer practice of *Ijtihad* in order to serve his ultra-Traditionalist agenda. The Commission cited him partly to appear as if it were drawing the conclusions contained in the Report from all sectors of society, even ultra-Traditionalists. The Commission agreed with Iqbal's criticism that in practice, situations and circumstances do indeed arise that could not have been imagined by any of the schools of law's thinkers and writers, and that "unalterable laws" were "exceedingly strange in a system of law—based mainly on the groundwork provided by the Qur'an which embodies an essentially dynamic outlook in life. It is therefore necessary to discuss causes of this

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48. THE REPORT, *supra* note 16, at 40 (quoting IQBAL, THE RECONSTRUCTION OF RELIGIOUS THOUGHT IN ISLAM 148-49).

intellectual attitude which has reduced the law of Islam practically to a state of immobility.”<sup>49</sup>

The Commission relied on Iqbal’s criticisms of rigid acceptance of an established jurist in order to prove that stagnation in Muslim jurisprudence—the “Closing of the Gate of *Ijtihad*”—had to end. The Commission did not belabor the reasons why the gate supposedly closed.

We cannot go into the causes that led to this stagnation, but a very unfortunate consequence of the worship of the letter, and undue reverence of the past, was that it became almost an article of faith with the large majority of the learned and the unlearned that the days of creative and adaptive legislation were over and the door of *Ijtihad* was closed after the fourth century of the Islamic era.

There is no denying the fact that Muslims all over the world, during the last three centuries particularly, were left behind in the rapidly accelerating race of social, political, economic and cultural advancement.<sup>50</sup>

In addition, the Commission seemed to want to prove that the “Gate of *Ijtihad*” that so many argued and believed had closed *had perhaps never closed*, but rather had been unfortunately slammed shut and kept shut by an advancing world that left the Muslim world in a “backwards” state of affairs.

One major cause of this universal backwardness is the unwillingness of Muslim peoples to appreciate the significance of changing realities and the influx of new and undreamt of factors. The attitude of the employer to the employee, . . . and of man to woman has changed and is changing beyond recognition. These changes require a modern approach, new rules of conduct, and fresh legislation in almost all spheres of life and a radical remodelling of the legal and judicial system.<sup>51</sup>

## 2. *Anticipating the Traditionalists’ Arguments*

The Commission anticipated the Traditionalists’ central arguments against the findings in its Report and any ensuing legislative reforms, and took precautions to counter those arguments in its Report. First, the Commission was careful to define *Ijtihad* as a methodology—part of *usul-al-Fiqh*, and not substantive doctrine as might be found in the *Shariat*.<sup>52</sup> *Ijtihad* was not law itself, they wanted to reassure the Traditionalists, but only a method by which to arrive at the law.

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49. *Id.* (quoting IQBAL, THE RECONSTRUCTION OF RELIGIOUS THOUGHT IN ISLAM 148-49).

50. *Id.* at 42-43.

51. *Id.* at 43.

52. The Qur’an and the *Sunna* together are known as the *Shariat*.

There is a tendency in the common people and among a section of the less learned theologians to confuse *Shariat* [the substantive law] with *Fiqh* [the methodology]. No Muslim has a right to propose any changes in . . . the *Shariat* which consists of those elements of law and rules of conduct that are binding on all Muslims and in which individual judgment can find no place. *Fiqh*, on the other hand, deals to a very large extent with details and interpretation of injunctions or concerns itself with situations that were not definitely envisaged by the Qur'an or the *Sunnah*. When learned scholars like . . . Iqbal urge . . . the necessity of *Ijtihad* or the reconstruction of Muslim jurisprudence, it is not . . . *Shariat* which they want to modify or adapt, but those parts of *Fiqh* which have lost all contact with present-day realities. . . . The Commission is not authorised or prepared to tamper with the *Shariat*, but its members and hundreds of Muslims who have answered the Questionnaire . . . have exercised their judgment freely in matters that pertain to *Fiqh*. Law is ultimately related to life experiences which are not a monopoly of the theologians only.<sup>53</sup>

The phrase rings in the reader's ears: "not a monopoly of theologians." Anticipating a second Traditionalist argument that only those properly trained in Islamic law were qualified to interpret law, the Commission addressed the issue of the *Mujtahids*. Those who had traditionally been vested with the authority to engage in *Ijtihad*, those who had been "qualified" interpreters—*Mujtahids*—would be reminded that Islam was a religion without a class of priests who were separate from the laity. "Some may be more learned in Muslim law than others, but that does not constitute them as a separate class; they are not vested with any special authority and enjoy no special privileges."<sup>54</sup>

Third, the Commission acknowledged that it, a semi-legislative body, could not enjoy special privileges. In support of that proposition, it claimed that it could suggest legislative reforms without going beyond the fundamental principles of Islam. "The Commission, by its terms of reference cannot go beyond the fundamental principles of Islam and has neither any desire nor any intention to do so. The members of the Commission are of the firm conviction that the principles of law and specific injunctions of the Holy Qur'an, if rationally and liberally interpreted, are capable of establishing absolute justice."<sup>55</sup> If indeed the gate of judicial interpretation had closed in the tenth century, then certainly the time had come to reopen it.

Fourth, the Commission anticipated the Traditionalists' argument that any reforms to family law would be the influence of Western liberal ideologies. In a disarming move, the Commission acknowledged Western influence, criticized

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53. *Id.* at 48-9.

54. *Id.* at 44.

55. *Id.* at 45.

the British judicial influence, praised the clarity of explicit Islamic injunctions, criticized Muslims' ignorance of Islamic law, and yet still came to the conclusion that new legislation was necessary in order to further clarify muddled areas of the law as well as to educate the masses.

[I]t is not explicit Islamic injunctions that are to be amended or altered; they are only to be liberally and rationally interpreted and properly implemented. The necessity for this Commission arose from the fact that ignorance of Islamic laws on the part of the general public is as much responsible for the ills and evils that have cropped up in marital relations as the unprogressive rigidity of the Anglo-Muhammadan Law and the complicated, dilatory, and expensive procedure of the judicial system introduced by the British.<sup>56</sup>

### 3. *The Traditionalist Arguments Against the Report*

Predictably, the Traditionalists' arguments were those which the Commission had anticipated. But what seemed to be most infuriating (and perhaps worrisome) to the Traditionalists were the contents of the Introduction to the Report written as a preface. As noted above, the Commission was accused of attempting to redefine and broaden the scope of *Ijtihad*'s application.

The Traditionalist arguments centered around the objection to the Commission's definition of *Ijtihad*. To accept the Commission's definition would mean accepting that the Commission had the authority to engage in *Ijtihad*, which, if true, would mean that its Report and any ensuing legislation would be "Islamic." The first attack on the Report's Introduction was written by the Commission's one religious member, Maulana Haq, who refused to sign off on the Report and instead wrote a separate dissent, often cited by subsequent Traditionalist articles. He specifically addressed the Report's Introduction:

This [Report] starts with a long Introduction, which not only unsuccessfully attempts to undermine the accepted tenets of Islam and the fundamentals of Islamic Shariat but is also irregular and unconstitutional, for not a word of this Introduction was ever brought before the Commission for discussion. It is most arbitrary to make the un-Islamic views and personal caprices of a layman as the Introduction to and the basis for the Report of the Commission without the knowledge or consultation of its members. Of all the irregularities that have so far been committed in the transaction of the Commission's business, this is by far the worst and most unpardonable. . . . It is obvious, therefore, that to take personal and individual whims as the basis for the derivation of

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56. *Id.* at 49.

laws and principles is neither “Fiqh” nor “Ijtihad” but amounts to distorting the religion. . . .<sup>57</sup>

Maulana Maududi objected to the definition of *Ijtihad* for two main reasons. First, a broad definition of *Ijtihad* would mean the Commission might have the power to practice it, thus legitimizing their legislation. “If *Ijtihad*, in the terminology of Islamic law, means forming of ‘an independent judgment on a legal question,’ then what difference is there between *Ijtihad* and legal judgments and opinions of modern legislators? Would it not mean that the Muslims have simply christened independent legislation as *Ijtihad* and there is no material difference between the two?”<sup>58</sup>

Second, a broad definition would mean judges could and might take over the tasks that formerly belonged to the *Mujtahids*. Traditionalists could not tolerate this, even if it meant they had to openly condemn the Modernist agenda of social justice, which the Modernists had cleverly described as the spirit of democracy. Maududi wrote:

The members of the Commission do not think that any qualifications are essential for a *Mujtahid*. To bring up the alleged spirit of democracy, they think that everybody can and should exercise *Ijtihad*. . . . To support this view they have forged two arguments. First, they hold that as there is no priesthood in Islam therefore ‘Ulama and non-’Ulama stand on an absolutely equal footing. Secondly, they have very adroitly tried to give a wrong impression to the reader by translating ‘Alim and ‘Ulama as “Muslim scholar” or “people with knowledge.” By this device they have tried to impress upon the common folk that even the Hadith entrusts this task to all the educated people and not exclusively to those who are well versed in the Qur’an and the *Sunnah*.<sup>59</sup>

Islahi, a prominent Traditionalist leader and author of *A Critique of the Modernist Approach to the Family Law of Islam*, along with other Traditionalists, was very concerned about preserving the *Mujtahid*’s role. Many of the Traditionalists’ criticisms were directed towards the Commission’s lack of qualifications to define *Ijtihad*, let alone practice it.

#### D. *The Muslim Family Law Ordinance of 1961*

During the 1950s, at the time the Ordinance was being promulgated, the level of education and employment among women was rising, the government

57. Khurshid Ahmad, *Some Reflections on the Report*, in *STUDIES IN THE FAMILY LAW OF ISLAM* 201, 210-12 (Khurshid Ahmad ed., 1959).

58. Maulana Amin Ahsan Islahi, *A Critique of the Modernist Approach to the Family Law of Islam*, in *STUDIES IN THE FAMILY LAW OF ISLAM* 87, 115 (Khurshid Ahmad ed., 1959).

59. *Id.* at 117-18.

was especially wary of reactionary elements, and society had adopted a generally more secularist attitude.<sup>60</sup> Modern forces, including women's groups such as the All Pakistan Women's Association and the United Front for Women's Rights, devoted their efforts during the late 1950s and early 1960s to the passage of a new ordinance that would redefine women's rights concerning marriage, divorce, polygamy, and inheritance. The class lines in the movement were clear: Upper-class women, often educated, were the driving force behind the reforms. They had encouraged the Commission's appointment in 1955 and influenced its composition and leadership. For example, the Commission was headed by the Supreme Court's Chief Justice Abdur Rashid, whose female relatives were members of the Women's Action Forum.<sup>61</sup>

Some scholars argue that the 1961 Muslim Family Law Ordinance (MFLO) was Pakistan's most definitive step towards giving women and men "equal rights," yet the MFLO failed in the sense that its reforms were weak and watered down versions of the Marriage Commission Report's recommendations. Specifically, its reforms were prescriptions for procedural safeguards rather than clear prohibitions of certain acts. This shortcoming was a result of the two viewpoints that existed in Pakistan concerning family law: Modernist and Traditionalist. In sum, "[t]he MFLO reflect[ed] [a] compromise between Traditionalists and Modernists. This compromise weakened the effect of the reforms."<sup>62</sup>

The MFLO had two goals: to discourage polygamy and to regulate divorce, though it also introduced reforms in the areas of maintenance, marriage registration, and inheritance. All along, the Ordinance compromised between the Report's suggestions for legislative reform (compromises in and of themselves) and Traditionalist forces.

The Ordinance's provisions for marriage registration and polygamy, detailed below, are each an illustration of such compromises made between the Report's Modernist authors and Traditionalist opposition. Marriage registration and polygamy are each examined in two parts. First, three opinions of the subject are

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60. MUMTAZ, *supra* note 28, at 57.

"More women were receiving education and entering new fields of employment. Besides medicine and teaching (the professions considered most acceptable for women) other avenues were being opened and tried. Women entered journalism, fields of science and the civil services. Greater freedom in the social environment was due to the liberal, modernist attitude of the military government. The higher echelons of the army were Sandhurst trained and steeped in British Indian army traditions. Similarly, the senior bureaucrats—who continued to look after the civil administration despite the army takeover—were fairly typical westernized Muslims. They thought of themselves as Muslims and believers in the principles of humanism embodied in Islam. They saw they saw themselves as progressive and pragmatist, and abhorred religious orthodoxy, which in their perception was weighed down by dogma, ritual and superstition and holding back progress. Ayub Khan especially had a very strong aversion to the reactionary element and held it responsible for the backwardness of the masses and the country. In such an environment, there were no obstacles placed in the way of women's exploring the fields of education and work, and it was during this period that the Rashid Commission recommendations were promulgated."

61. *Id.* at 56.

62. MEHDI, *supra* note 23, at 157 (citing John Esposito, *Muslim Family Law Reform in Pakistan*, 4 JOURNAL OF MALAYSIAN AND COMPARATIVE LAW 293, 299 (1977); David Pearl, *Family Law in Pakistan*, 9 JOURNAL OF FAMILY LAW 165, 189 (1969)).

offered as proof of the interests influencing each issue. The opinions are that of the Commission, that of Traditionalist Maulana Maududi, and that of Traditionalist Maulana Islahi. Second, each topic is examined in light of the Muslim Family Law Ordinance. What should become clear is that (1) even among the Traditionalists, opinion was fragmented (Maududi seems to take a calmer middle road while Islahi is more vehemently anti-Western), and that (2) the MFLO offered at most procedural safeguards that might protect women or provide them with some rights, but it never actually prohibited any practices that might hurt them. In other words, the MFLO's writers yielded to Traditionalist pressures and struck a middle ground.

### 1. *Marriage Registration*

#### a. The Debate Over Marriage Registration

It will be useful to examine and compare the Marriage Commission's answers, the Traditionalist Maududi's answers, and the Traditionalist Maulana Islahi's answers to the same question regarding marriage registration. The question posed to the Commission was: "Should there be compulsory registration of marriages, and if so, what machinery should be provided therefor?"<sup>63</sup>

The Commission's answer read, in part:

The registration of marriages must be made compulsory as complex questions relating to the validity and existence of Nikah [marriage] between certain parties arise very frequently in civil and criminal courts. It often happens that two men each claims to be the husband of the same woman, in order to escape being convicted under section 498 of the Pakistan penal Code for abduction. Difficulties also arise in cases relating to inheritance. . . . In suits relating to maintenance, a great deal of oral evidence is produced to prove that the woman claiming maintenance is not a legally married wife but a mistress or a keep. Registration would be facilitated if a standard Nikah-nama [contract] is prescribed.<sup>64</sup>

Maulana Maududi wrote in reply:

As for compulsory registration of marriages, there are two positive disadvantages in it. First of all, those who do not follow this procedure will be penalized and there would be an addition of a hitherto non-existing offence. This will add to the menacing curse of litigation. Secondly, the courts will have to refuse granting recognition to

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63. THE REPORT, *supra* note 16, at 52.

64. *Id.* at 53-54.

unregistered marriages, although a marriage, although a marriage solemnised before two witnesses is held proper by the Shariah<sup>65</sup> . . . .

Maulana Islahi wrote more vehemently and emotionally in response to the Commission:

Would our pseudo-reformers be prepared to follow the example of [western imperialism]. . . . The very first consequence would be that all those marriages which are not registered would be illegal and void and the children born as a result of such marriages would be illegitimate. These children would also be deprived of their rights of inheritance. It is clear that beyond all doubt that this is in conflict with the law of the Shari'ah. The Shari'ah sanctions every marriage which is performed in the presence of at least two witnesses and confers it with full legal title. Thus a conflict between the Shari'ah and the law of the land would ensue. Do the members of the Commission want this conflict to rage?<sup>66</sup>

The Modernist and Traditionalist camps' differing opinions are clear: the Modernist Report suggested compulsory registration, while Traditionalists were split as to the exact evils of compelling registration. It was this tension that the Ordinance's writers had to deal with.

#### b. The Ordinance's treatment of marriage registration

Despite the debate, the Ordinance adhered mostly to the Commission's recommendations; the MFLO required that all marriage contracts be registered.<sup>67</sup> Whereas classical Hanafi law only required that a marriage contract involve an offer and acceptance in the presence of two witnesses, insupportable claims resulting from oral contracts under Hanafi law were often brought. In response to that problem, legislators introduced the requirement of written registration and created the office of a Marriage Registrar to grant licenses. Section 5 of the MFLO reads:

#### 5. Registration of marriages.

Every marriage solemnized under Muslim Law shall be registered in accordance with the provisions of this Ordinance.

For the purpose of registration of marriages under this Ordinance, the Union Council shall grant licenses to one or more persons, to be called Nikah Registrars, but in no case shall more than one Nikah Registrar be licensed for any one ward.

65. Maulana Abul Ala Maududi, *The Questionnaire and its Reply, Tarjumanal Qur'an*, Lahore, Vol. 45, No. 4, reprinted in *STUDIES IN THE FAMILY LAW OF ISLAM* 16 (Khurshid Ahmed ed., 1959).

66. Islahi, *supra* note 58, at 142.

67. MUSLIM FAMILY LAW ORDINANCE, (1961) (Pak.).



Every marriage not solemnized by the Nikah Registrar shall, for the purpose of registration under this Ordinance, be reported to him by the person who has solemnized such marriage.

Whoever contravenes the provisions of subsection (3) shall be punishable with simple imprisonment for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both.

The form of nikahnama, the registers to be maintained by Nikah Registrars, the records to be preserved by Union Councils, the manner in which marriages shall be registered and copies of nikahnama shall be supplied to the parties, and the fees to be charged therefor, shall be such as may be prescribed.

Any person may, on payment of the prescribed fee, in any, inspect at the office the Union Council the record preserved under subsection (5), or obtain a copy of any entry therein.

Of course, legislators who wrote the MFLO did not want to be accused by Traditionalists of fanning the fires of the “raging conflict” as Islahi accused them of doing.<sup>68</sup> Thus, a compromise ensued: the legislators followed the British example by introducing change through procedure rather than through substance. Failure to register marriages attracted a penalty, but did not render a marriage null and void. This often left women in unwanted and often unhappy marriages even if their husbands or fathers failed to register the marriage, since under Rule 5 the marriage was not void. And if a marriage was not declared void, any suit involving divorce, paternity, or inheritance was still admissible in a court of law.<sup>69</sup> The restrictions were thereby weakened.

## 2. Polygamy

### a. The debate over polygamy

It will again be useful to compare the Marriage Commission’s answers, Maulana Maududi’s opinion, and Maulana Islahi’s opinion on polygamy in order to begin to see how the MFLO compromised on this issue, even though polygamy was a practice Modernist activists seemed most vehement about abolishing. The following questions were posed to the Commission:

The Qur’anic verse dealing with polygamy occurs only in connection with the protection of the rights of orphans. Is polygamy prohibited except when the protection of the rights of the orphans is the main objective? Should it be made obligatory on a person who intends to marry a second wife in the life-time of the first to obtain an order to that

68. See Esposito, *supra* note 25 at 300.

69. *Id.*

effect from a court of law? Should it be laid down that no court can grant such an order till it is satisfied that the applicant can support both wives and his children in the standard of living to which he and his family have been accustomed?

The Commission answered:

There is only one verse in the Holy Qur'an which deals with the question of polygamy. The verse was revealed to solve certain difficulties which had arisen in the matter of orphan girls and widows. The permission to marry more than one wife originated for the establishment of social justice. . . . But proviso was attached to this permission that if this way of solving the problem leads to injustice for family relations then the Muslims are advised to practise monogamy only. . . . It is a universally accepted maxim that prevention is better than cure.<sup>70</sup>

The Commission relies on Qur'anic verse as support for its liberal agenda: curbing polygamy. The Commission does not go quite so far as to suggest prohibiting it. In its Report, the Commission argues that permission to marry more than one wife established social justice *at that time that law was created*, that is, in the 7th century. Analogously, the *regulation* of the practice will establish the Modernist goal of social justice in the present day.

Maulana Maududi wrote:

The Shariah has made no difference between the first, second, third and fourth marriages. . . . If the first marriage requires no order from a court of law, even the third and fourth, what to say of the second marriage, should not be conditioned with the procurement of any court order. Suggestions like these can be considered only on the presumption that polygamy is inherently an evil and that, if it cannot be abolished altogether, it must be checked by legal restrictions. This is the view of the Roman Law, not of the Islamic Law. . . . Moreover, how queer it is that leaving aside all of the other considerations, such as those of affection and of love, the bliss of matrimonial relationship and of the peace, poise and happiness of the family life, the only question that has been given any weight is that of satisfying the court in respect of one's financial ability to support the wives and their children.<sup>71</sup>

Maududi uses "love" and "marital bliss" as rationales for his conservative agenda: allowing polygamy. This is ironic, since we will see below how the

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70. THE REPORT, *supra* note 16, at 62.

71. Maududi, *supra* note 65, at 25.

modern judiciary, descendants of the Commission and its Modernist supporters, use “love” and “marital bliss” as rationales for granting women divorces.

Maulana Islahi wrote:

It is absurd to say that the permission to marry up to four wives was granted by this verse, or that it was granted merely to protect the rights of the orphans and the widows. What can be justifiably said is that through this verse Muslims were asked to avail of a permission, that already existed, for the solution of a social problem.<sup>72</sup>

Islahi then lays out the multiple social and personal needs which compel the continuation of polygamy, including:

(1) Social and national exigencies such as war, surplus women, and sexual laxity; (2) Men’s duty to disseminate Islamic teachings; (3) Providing a service and a sacrifice by exalting the position of widows and children; (4) Moral dilemmas such as falling in love with another woman or having the misfortune of being endowed with extraordinary sexual strength but not wanting to engage in sinful extramarital affairs; and (5) Avoiding the sinful Western ways of life that involves satisfying sexual urges in nightclubs and brothels.<sup>73</sup>

Maulana Islahi, in contrast to the Commission, uses the language of curing a “social problem,” not achieving “social justice.” Islahi expends much energy exploring Western vices and explaining that a central benefit of polygamy is that it prevents the spread of Western influences.

Again, we see the tension even within the Traditionalist movement as to what exactly its goals are. Maududi argues against Western influence within the legal tradition, supporting Islamic legal traditions over Roman ones. Islahi, on the other hand, focuses his enmity for the West on its sexual practices, not its legal doctrinal traditions. Neither, however, addresses the Commission’s central point, which is the need for malleable rules that keep up with current social needs.

#### b. The Ordinance’s treatment of polygamy

*Polygamy* is addressed in section 6 of the MFLO:

No man, during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance.

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72. Islahi, *supra* note 58, at 169.

73. *Id.* at 171-73.

An application for permission under subsection (1) shall be submitted to the Chairman in the prescribed manner, together with the prescribed fee, and shall state the reasons for the proposed marriage, and whether the consent of the existing wife or wives has been obtained thereto.

On receipt of the application under subsection (2), the Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant, subject to such conditions, if any, as may be deemed fit, the permission applied for.

In deciding the application the Arbitration Council shall record its reasons for the decision and any party may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision, in the case of West Pakistan, to the Collector and, in the case of East Pakistan to the Sub-Divisional Officer concerned and his decision shall be final and shall not be called in question in any Court.

Any man who contracts another marriage without the permission of the Arbitration Council shall: (a) pay immediately the entire amount of the dower, whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid, shall be recoverable as arrears of land revenue; and (b) on conviction upon complaint be punishable with simple imprisonment which may extend to one year or with fine which may extend to five thousand rupees, or with both.<sup>74</sup>

While the procedural requirements impose penalties and provide the existing wife with the right to dissolve her marriage, the law does not make a second marriage null and void. This is the section's biggest loophole. ". . . [I]f restrictions on polygamy are to be effective, the law should go further and lay down, that if another marriage is contracted during the subsistence of a marriage, without the prior permission from the relevant judicial authority, such polygamous marriage shall be illegal and void . . ."<sup>75</sup>

Thus, the MFLO limited polygamy in an attempt to discourage it, but did not prohibit it altogether. In order to have more than one wife, the legislation required a man to obtain the first wife's consent and to present his request, giving reasons, to an arbitration council that would consist of a representative from each party (the husband and the first wife) and the local council's chairman. Though the Marriage Commission recommended that a husband's valid reasons included, for example, a first wife's insanity or terminal illness,<sup>76</sup>

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74. MUSLIM FAMILY LAW ORDINANCE, (1961) (Pak.)

75. MEHDI, *supra* note 23, at 164-65 (citation omitted).

76. ABBOTT, *supra* note 44, at 200.

the final decision lies with the arbitration council. In theory, the arbitration council enjoys great discretion.

A man who fails to comply with the MFLO's regulations can be penalized in several ways, including:

immediate payment of the entire dower to his existing wife or wives; his wives have the right to immediate dissolution of their marriage; imprisonment for up to one year and/or a fine up to 5,000 rupees. . . . Furthermore, marriages contracted without the Council's permission are denied official registration and thus all cases which might arise from such a marriage are denied judicial relief.<sup>77</sup>

But again, like marriages that are not registered, polygamous marriages are still valid. In addition, critics have noted that an Arbitration Council may lack negotiation experience. The Arbitration Council may not be objective either; in a society in which the public sphere is almost exclusively occupied by males, alliances between men may form unwittingly.

#### V. THE JUDICIARY AND THE CASE OF DIVORCE

Examination of the Ordinance's treatment of marriage registration and polygamy reveals that the Ordinance was a compromise between Modernist and Traditionalist forces. Women received certain strengthened but not guaranteed rights. Thus, they were not liberated to the extent they could have been. Given the Ordinance's inherent inability, then, to provide women any assured substantive legal relief, judges have begun to apply their own reasoning to sets of facts in order to reach equitable results. The methods they use include mixing civil and common laws, or ignoring the code altogether. Nowhere is this trend more clear than in the area of divorce law.

Since the 1960s, courts have been taking upon themselves a quasi-legislative role in the area of family law. Often, in examining Muslim marriage and its roots in the contract, the assumption is that there is no room for sex, love, or romance. The stereotypical vision of the Muslim marriage is a contractual one in which a minor girl is arranged to marry a much older man against her wishes and in return for a significant payment to her father. While stereotypes are exaggerated generalizations, they can hold some truth. Muslim marriages are contractual, and women and men bargain for the terms on which they want to live their lives. Some version of the story certainly occurs. Note the case of *Khalil Ahmad v. Riaz Bibi*, where the judge wrote, "I have gone through the pleadings . . . . The respondent-wife was successful in proving her case by producing irrefutable testimony of natural witnesses who deposed that the respondent was married to the petitioner forcibly; that she did never accept the [marriage contract]; that the

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77. Esposito, *supra* note 25, at 300.

petitioner was quite an old man; and that he had leveled false charge of adultery against her.”<sup>78</sup>

The interesting but lesser known twist to this stereotype, contrary to popular belief, is that Riaz Bibi had a remedy to her unhappy marriage. The Court wrote that it was natural for the wife to have developed an aversion to her husband, and so she had fulfilled the requirement for the court to grant her a divorce. This is her right of *khula'*. Whereas a husband used to have the unilateral right to divorce, known as *talaq*, courts are increasingly giving women the right to divorce their husbands.

Historically, if a Muslim woman wanted to divorce her husband, she would either have to force him into divorcing her (by disobeying or merely annoying him beyond toleration), or she would have to negotiate her right to a no-fault divorce into her marriage contract at the outset, according to the Dissolution of Muslim Marriages Act of 1939.<sup>79</sup> Recently, a new kind of “no-fault” divorce has crept into Pakistani family law, a kind of “irreconcilable differences” principle with a “hate standard.” If a judge finds that a woman “hates” or is “averse to” her husband, and cannot live with him “as man and wife”—implying that the sexual component of marriage is impossible—then he will issue her a judicial decree of divorce under the theory of a right to *khula'*. Whether this right of divorce is basically equal to a man’s right to *talaq* - the unilateral right to pronounce himself divorced from his wife which does *not* require a judicial decree—is a hot topic of debate in Pakistani family law. In addition, the stronger right to a *khula'* divorce is compromised by the fact that women still have to give up financial rights to any property or dowry they may have brought into the marriage.

As the cases in this section will show, judges are interpreting the code (the Muslim Family Law Ordinance) in a way they feel will render women seeking divorces the most “social justice”—precisely the Modernists’ goal. However, Modernist judges have the burden of maintaining a balancing act. On the one hand, they seek to subvert the Ordinance’s language in order to expand the universe of women’s options. On the other hand, they have to respond to the decisions their Traditionalist colleagues are handing down without rocking the boat unnecessarily. Traditionalist judges usually stick to the four corners of the MFLO, though they sometimes ignore the Ordinance and instead rely on traditional Hanafi doctrine. Freeland Abbott writes:

[n]othing more clearly illustrates the nature of the gap between modernists and the traditionalists than this question of divorce. But the issues are not always so clear, although the assumption that Islam promotes happiness and security in family life (and any rule which does

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78. RASHIDA PATEL, SOCIO-ECONOMIC POLITICAL STATUS AND WOMEN AND LAW IN PAKISTAN 1991

79. *Supra* note 28.

not do this, the modernist would argue, cannot be Islamic) is consistently followed.<sup>80</sup>

### A. *Talaq*

First, a brief examination of *talaq*, a husband's unilateral right to pronounce himself divorced from his wife, is useful to see the beginnings of the judiciary's new interpretative role in divorce law.<sup>81</sup> Traditional Islamic law provides for three different kinds of *talaq*. Rubya Mehdi succinctly describes them:

The more approved forms of divorce are *talaq-al-ahsan* and *talaq-al-hasan*. . . and these forms of *talaq* are revocable. If a husband chooses to divorce in the *al-ahsan* form he makes a single pronouncement during the period of *tuhr* (when his wife is not menstruating) and abstains from sexual intercourse during one *iddah* (a period of three menstrual cycles). Divorce is revocable during *iddah*. In *talaq-al-hasan* there are three pronouncements of divorce in three separate *tuhrs*. The third pronouncement of divorce is final and irrevocable. The third form of divorce is *talaq-al-bidah*, which is not much approved but is widely practised among the Muslims of Pakistan. It consists of three declarations of divorce occurring at one time and the marriage is then irrevocably dissolved. The main difference between *talaq-al-Sunnah* and *al-hasan* and *talaq-al-bidah* is that the former two forms are revocable within a prescribed period, while the latter form is irrevocable.<sup>82</sup>

The divorce rate, however, is extremely low, despite the ease with which a man can unilaterally divorce his wife.<sup>83</sup> This is for two reasons. First, the economic pressure is significant. Usually a man pays part of the dower at the

80. ABBOTT, *supra* note 44, at 199.

81. PATEL, *supra* note 78 at 185-6. ("Husband wife cohesion, subservient status of the wife, traditions, customs, social norms and pressures, religion, economic circumstances, obligation for payment of deferred dower on divorce, dependence of children on their mother and the attachment of the father to the children, the deterrents for the wife to seek legal redress, and at times the economic dependence of the wife with little alternative but to submit to the will of her husband, all combine to limit divorces.... For a husband to divorce his wife there is a very simple procedure; he has to assign no reasons for divorcing her and he has no liability to maintain his ex-wife, yet the incidence of divorce is low... According to a sociological study conducted in an urban community of thirty thousand people in Lahore by the maternity and Child Welfare Associates of Pakistan it was revealed, 'Amongst married women aged 14 to 50 years, 2.62 per cent were divorced and 0.55 per cent were separated (footnote omitted). This finding related to the city of Lahore, whose inhabitants are comparatively liberal in matters of divorce. Another survey depicts a very low percentage of divorced persons. Of the total population of all ages 38.33 per cent are married and 0.22 per cent are divorced; of persons between 25-29 years, 78.75 percent are married and 0.45 per cent divorced; of persons 35-39 years, 93.32 per cent are married and 0.52 per cent divorced (footnote omitted)... The Prophet (Peace be upon Him) has said that of all the permitted things, divorce is the most abominable with God.")

82. MEHDI, *supra* note 23, at 166-67 (citing K.N. AHMED, *MUSLIM LAW OF DIVORCE* (1984)). Revocability means that the husband can reunite with his wife without creating a new marriage contract. If a divorce is irrevocable, a new contract must be negotiated, either with the same or different terms.

83. See, e.g. SYED JAFFER HUSSAIN, *MARRIAGE BREAKDOWN AND DIVORCE LAW REFORM IN CONTEMPORARY SOCIETY* (1983); KEITH HODKINSON, *MUSLIM FAMILY LAW: A SOURCEBOOK* 222 (1984).

time the contract is signed and the rest, known as the deferred dower, later. If he pronounces *talaq*, he must give her the deferred dower he contracted to give her in the *Nikahnama* (the marriage contract). Second, if he divorces his wife, he loses the dowry (such as clothes, household items, but less often money) which his wife brought with her into the marriage. The social pressure is great, too: often a husband and wife's family will be connected, either through business or through relations, as families frequently marry off more than one child to siblings of another family.

### 1. *The Ordinance's treatment of Talaq*

Section 7 of the MFLO outlines the procedure the state requires the husband to follow once he pronounces *talaq*. The MFLO's section 7 reads:

#### 7. Talaq

Any man who wished to divorce his wife shall, as soon as may be after the pronouncement of *talaq* in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.

Whoever contravenes the provisions of subsection (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees or with both.

Save as provided in subsection (5), a *talaq* unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the Chairman.

Within thirty days of the receipt of notice under subsection (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

If the wife be pregnant at the time *talaq* is pronounced *talaq* shall not be effective until the period mentioned in subsection (2) or the pregnancy, whichever be later, ends.

Nothing shall debar a wife whose remarriage has been terminated by *talaq* effective under this section from re-marrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.<sup>84</sup>

"It is obligatory for the husband to give notice of the pronouncement of *talaq* to the Chairman, and a copy thereof to the wife, and the *talaq* does not become effective before the expiry of ninety days from the day notice of pronouncement

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84. MUSLIM FAMILY LAW ORDINANCE (1961) (Pak.).



of *talaq* is received by the Chairman [of the Local Council].”<sup>85</sup> The waiting period serves two purposes: to allow time to determine if the wife is pregnant, and to allow an Arbitration Council to be set up and bring about a reconciliation. If the couple reconciles, the husband must revoke the notice.<sup>86</sup>

Two points on which the classical Islamic law and the MFLO conflict are that (1) the MFLO provides room for reconciliation, and (2) the notice required by the MFLO to the Council Chairman and to the wife. Under the Ordinance, mere pronouncement of *talaq* without notice to the Chairman does not make the divorce effective in the state’s eyes, though it is effective under classical Hanafi law.

*2. The judiciary’s application of the Ordinance’s Talaq laws: the case of “Notice”*

The question of notice and its effectiveness is one of the main sources of divorce litigation in family courts. As with the registration of marriages, notifying the Council Chairman of the husband’s pronouncement of the divorce is a way of registering it. The Ordinance has provided guidelines for notifying the proper authorities, but its writers did not address whether notice could take other forms, such as recording the divorce with the marriage and divorce registrar. In cases where it is not clear whether notice has been given, courts have had to decide the question “Did the husband really intend to divorce his wife, and how can we tell?” In answering that query, courts have sought results that they feel will most help the wife. In most cases, this means declaring a lack of notice even where there seems to be overwhelming proof to the contrary in order to prevent hardships to women. The following cases illustrate that point.

In 1987, the Supreme Court held in *Javed Ali v. Abdul Kadir*, 1987 SCMR 518 (Pak.), that when a husband pronounces *talaq* but abstains from giving notice to the local council, he in effect revokes the pronouncement and the parties remain husband and wife in the eyes of the law. In 1990, the Supreme Court held that where a wife applied to the local Chairman for spousal support after the expiration of ninety days from the service of notice, her application was not maintainable because she was no longer the respondent’s wife under section 7 of the MFLO.<sup>87</sup> Both these cases reflect a direct application of the Ordinance’s notice requirement, and they both reach a result that benefits the wife.

In *Lal Din v. Zeenat Bibi*, the deceased’s third wife’s children, in order to secure their inheritance, were trying to prove that their father had divorced the first wife.

The dispute related to the inheritance of one Hakim who, according to the respondents’ version, took three wives, namely, Zeenat Bibi, Hussain

85. PATEL, *supra* note 78, at 192.

86. MUMTAZ, *supra* note 24, at 58.

87. Mst. Naziran v. The Collector, Sialkot, 1990 SCMR 803 (Pak.).

Bibi and Raisham Bibi. The present appellants are his progeny through the last mentioned lady and their version in one of the two suits was that he had divorced Mst. Zeenat Bibi before his death while he never married Mst. Hussain Bibi. The latter controverted the appellants' claim . . . [bringing] a separate suit . . . affirming to have been left as a widow by the deceased. . . . The only question left for determination in the present appeal obviously was if Mst. Zeenat Bibi was divorced by the deceased before his death.<sup>88</sup>

The Court found that where there was not any proof of oral or written notice, the divorce was not adequately proven. Therefore the first wife was entitled to a share of the inheritance. Mere entry of a divorce into a divorce petition writer's register is not enough to prove *talaq*, but instead needs corroboration by witnesses of the oral pronouncement or by a written document of *talaq*.

This case reflects the judge's intervention on behalf of the first wife. A stricter reading of the code would leave her without remedy, since the entry of the divorce into the divorce register might otherwise constitute adequate proof of the husband's intent to divorce her. Where it would help the first wife, the standard for proving that a divorce was registered seems fairly high. Perhaps the real motivating factor in *Lal Din* was that the question needing determination—whether a man had divorced his first of three wives - prompted the Court both to sympathize with the first wife's situation and to indirectly condemn the deceased's polygamist tendencies.

In *Lal Din*, the husband's unilateral divorce from his wife was not "obvious" to the Court despite a written record of it. However, even when it seems obvious that a man has indeed divorced his wife, a court might nevertheless decide that notice was not given if such a decision will protect the wife.<sup>89</sup> In the case of *Muhammad Siddique v. Noor Jahan*, Mr. Siddique, brother of Ahmed Yar, sued for his "fair" share of his brother's land. Siddique argued that while he might be willing to share the land with Yar's second wife and her daughter, he should not have to share it with Yar's first wife (and her child) whom Yar had allegedly divorced through *Talaq*.<sup>90</sup> Siddique argued that the *Talaq* was valid even though no notice was given under section 7 since section 7's provisions were void as against the injunctions of Islam. The Court rejected Siddique's argument. It found instead that (1) only a carbon copy of the divorce decree existed and that no effort had been made to find the original decree of *Talaq* and (2) Siddique's main witness to Yar's *Talaq* pronouncement was one of Siddique's relatives and therefore unreliable. In addition, the Court agreed with the lower court's conjecture that an old man will not ordinarily divorce his wife in order to prove that Yar probably did not divorce his first wife.

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88. *Lal Din v. Zeenat Bibi*, 1987 CLC 587, 588 (Pak.)

89. *Shahid Nadeem v. Farzana Zaheer*, 1995 MLD 218, 219-20 (Pak.).

90. *Muhammad Siddique v. Noor Jahan*, 1994 CLC 1674, 1675-1677 (Pak.).

It is now [a] well-established legal proposition that even probability is a strong piece of evidence as held in cases of [lists cases]. . . therefore, the fact that Ahmad Yar deceased was an old man and was a T.B. patient and was having a daughter from respondent No.1, there is a strong probability that he would never like to divorce his wife at this stage of his age, and, therefore, is nothing wrong if this probability has been taken into consideration by the learned [lower courts].<sup>91</sup>

The Court crafted a rationale that would allow Yar's first wife and child to share in the inheritance, even if it means ignoring a "photostat" or xerox copy of the divorce decree, as well as a witness to the oral pronouncement.

In *Siddique*, a written record in the divorce register was not sufficient proof that the divorce was valid.<sup>92</sup> Taking that doctrine one step further in *Mst. Janat Bibi v. Mst Bhagan and others*, the Court ruled that a carbon copy of a Chairman's issuance of a certificate of divorce where no notice was proved to have been sent to the Chairman was not sufficient, especially where no Arbitration Council was formed nor where either husband or wife appeared in front of the Chairman at any point. The case revolved around the petitioner's claim that the deceased had divorced his wife, Mst. Bhagan, and that she was consequently unable to inherit as his widow.

[If a carbon copy of the certificate] issued by a Chairman is considered sufficient for dissolving a marriage, then marital bonds would remain under constant peril of dissolution because any body [sic] can collusively obtain such a certificate from a Chairman without even knowledge of the spouses. In the present case also the certificate appears to have been collusively obtained through the good offices of Muhammad Shafi, a paternal cousin of Mst. Janat Bibi, petitioner, who was the Chairman of the concerned Union Council. . . . The learned District Judge did not rely upon the same for sufficient and cogent reasons. He has rightly held that there was no evidence before the Chairman that the *Talaq* was at all pronounced . . . or that the said notice was ever sent to Mst. Bhagan.<sup>93</sup>

Thus, in *Janat Bibi* the Court ruled that Mst. Bhagan could in fact inherit from her deceased husband because a carbon copy of the divorce certificate was not "sufficient" (given the parties apparent lack of intent and probable collusive activity between the petitioner and officials). This is further proof that judges are looking out for female litigants' best interests irrespective of the Ordinance's fairly clear standards of notice.

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91. *Id.* at 1679.

92. *Id.*

93. *Janat Bibi v. Mst. Bhagan*, 1995 MLD 110, 111 (Pak.).

Yet another example of “judicial activism” is *Mushtaq Ahmed v. Mst. Sat Bharai and Five Others*.<sup>94</sup> There, the Supreme Court held that a woman could inherit from her husband because he died before the ninety-day waiting period expired. The purpose of that period was to give the husband time to reconsider his decision to divorce. The wife, the respondent, argued that since her husband had served notice in compliance with section 7 yet had died well before the expiration of ninety days, there was ample time for him to change his mind. The petitioner argued that the waiting period under section 7 had been misinterpreted as a “time for thinking and cooling down” in which the husband does not give up his right to *talaq*.<sup>95</sup> The Court disagreed with the petitioner and held,

From the facts narrated above it is clear that Gheba Khan died much before the expiry of 90 days. During this period, if he would have been alive, he would have had the option to revoke the divorce pronounced by him. There is a procedure provided under law under which reconciliation proceedings are initiated and it is only on expiry of 90 days of service of notice that the Talak becomes effective. On the date Gheba Khan died, Talak had not become effective in terms of section 7 of the Ordinance. Therefore, the respondent continued to be his wife.<sup>96</sup>

The Court, presented with a novel situation not explicitly addressed by the Ordinance, nonetheless fashions a rationale in order to confer the status of widow upon Gheba Khan’s former wife.

### 3. Religious courts attempt to craft solutions for social justice

In most matters, there is palpable tension between the methodologies of the secular family law courts and the religious courts. While the former try to follow a more secular code and a Western method of fact manipulation, the latter—namely the Federal Shariat Court (FSC), which hears all matters that concern questions of “Islamic law”—tries to follow Qur’anic text, Sunna, and Hadith much more closely.<sup>97</sup> But where traditional law may result in unacceptable consequences, both religious and secular courts use their judgment with attention to particular circumstances in order to achieve social justice. The judiciary has exercised its controversial right to choose to apply the Ordinance’s laws or to avoid them. In either case its objective seems to be to provide women litigants with some meaningful relief, whether that means granting or denying a divorce. In other words, the purpose is not dedication to any particular rule—whether the

94. 1994 SCMR 1720 (Pak.).

95. *Id.* at 1722.

96. *Id.*

97. The Federal Shariat Courts were established as part of dictator Zia-ul-Haq’s “Islamization” in the 1980s. The Family Courts are secular and separate from the Federal Shariat Court (FSC) and deal with any family dispute arising under the 1961 Muslim Family Law Ordinance. However, the FSC will hear a family lawsuit if a precept of Islamic law is claimed to be at issue.

MFLO's rule or the traditional Hanafi rule—but rather equitable results, however reached.

In *Noor Khan v. Haq Nawaz*, the Federal Shariat Court held that if two persons were living as husband and wife for a long time, and it is proved that there was an oral pronouncement of *talaq* but no notice was sent to the Chairman, the divorce was not valid. Therefore the two could not be accused of *zina* (adultery) for having sexual intercourse with each other after the verbal pronouncement.<sup>98</sup> This decision was crucial to the promulgation of “social justice,” since adulterers may receive the death penalty. Normally, the FSC would rely on traditional Hanafi doctrine and find that a mere oral pronouncement made for a valid divorce. Here, however, the FSC determined that since the Ordinance's notice requirement had not been met, the couple were still married. The FSC established a “belief of genuineness” standard modeled on the mistake of fact doctrine: the couple believed that they were still married since they had not given notice; therefore, they were not guilty of adultery even though they were in fact divorced.

The secular Supreme Court adopted the principle set forth by the Federal Shariat Court. Using the “belief of genuineness” standard but arriving at the opposite results, the Supreme Court has upheld “social justice.” In *Noor Khan*, notice was “necessary” for divorce to be effective because the couple remained together and continued to have sexual relations with each other. *Mst. Zahida Shaheen v. the State* presented a mirror-image set of facts.<sup>99</sup> The Supreme Court held that if two people believe that their marriage is over and that the *Talaqnama* is genuine, and they act on that knowledge (here, by marrying other people and having sex with those new spouses) they are not liable under Pakistan's adultery laws. The Court wrote (relying on their holding in *Allah Ditta v. Mukhtar* (1992 SCMR 1276)) that in general people do not send a notice of *Talaq* to the Chairman as required under the Muslim Family Law Ordinance. Therefore the failure to send notice does not render the divorce ineffective under Shariat if both appellants proceeded on the assumption that the *Talaq* the husband had given the wife was effective in Shariat, then they had not committed any offense and their divorce was valid.<sup>100</sup> *Noor Khan* and *Mst. Zahida Shaheen* are illustrative of how religious and secular courts are practicing *Ijtihad*. They are using their *independent judgment* to render social justice, since if any party is found guilty of adultery, the consequences are potentially fatal (a socially unjust outcome).

However, modern judges, whether they sit on the secular Supreme Court or the Islamic Federal Shariat Court, face opposition by judges who rely exclusively on traditional Islamic Hanafi doctrine. These Traditionalist judges attempt to resist the Modernist legal theory of independent reasoning by overcompensating and rejecting the Ordinance altogether. In *Allah Banda v.*

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98. *Noor Khan v. Haq Nawaz*, 1982 PLD 265.

99. 1994 SCMR 2098.

100. *Id.* at 2102.

*Khurshid Bibi*, a Traditionalist judge sitting on a secular Court determined that despite the MFLO's required ninety-day waiting period (the purpose of which is to give a husband the opportunity to revoke his pronouncement), pronouncing *talaq* three times in one sitting made divorce effective immediately, so that the question of its revocation or of a waiting period was moot.<sup>101</sup> The Court refers to the Hanafi school of Islamic jurisprudence,<sup>102</sup> and spends pages quoting various Hanafi jurists and scholars in order to "prove" that three *talaqs* pronounced at the same time dissolves the marital bond. It then goes on to say that the provision of section 7, including the 90-day waiting period, are repugnant to Islam.<sup>103</sup>

In a kind of counter-resistance, sometimes a modern judge will subversively work within the "Islamic" framework to prevent men from taking advantage of women. Note that in *Mst. Batool Bibi v. Muhammad Hayat and Another*, the Court used "*Iddat*" (the term in Islamic law for a period of three menstrual cycles) instead of the ninety-day waiting period under the MFLO in order to appeal to Traditionalists as it wrote its pro-woman decision:

[P]etitioner was married to respondent No. 1, Muhammad Hayat, in the year 1989. They lived together for about four months. After which disputes arose between the parties and petitioner returned to the home of

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101. 1990 CLC 1683.

102. See generally *supra* note 5. The Hanafi school of jurisprudence is one of four main schools of Islamic thought. The school's original scholar was Imam Abu Hanifa (8th century).

103. Allah Banda, 1990 CLC at 1691 (summing up the discussion in *Mirza Qamar Raza v. Mst. Tahira Begum and another* 1988 PLD 1969:

(i) Providing for the effectiveness of *talaq*, on the receipt of notice by the Chairman is against the injunction of the Qur'an and *Sunnah*. Mere non-receipt of the notice will not render the *talaq* as ineffective or void. Suspending the effect of the *talaq* of 90 days from the date of the receipt of notice is also against the injunctions of the Holy Qur'an and *Sunnah*. A *talaq*, if otherwise valid under Qur'an and *Sunnah* takes effect immediately on its pronouncement.

(ii) The Arbitration Council or its Chairman are not *talaq*-enforcing agencies. They are not supposed to give any decision on the question of validity or otherwise of the *talaq*, under the substantive law of *talaq*, applicable to the parties, or even issue a certificate to make the divorce effective or declare the same as ineffective. The certificate of confirmation, even if it is issued by the Chairman in this behalf, will have no legal effect, if the *talaq* under the substantive law, applicable to the parties, is not valid.

(iii) Ninety days period for the *talaq* being effective in case of the wives have ceased to menstruate (due to advance age or some other cause) will be in accordance with the injunctions of the Holy Qur'an. But to fix the same period of ninety days for the wives who menstruate will be against its express injunction. Their period is three Qur'un . . . periods. According to Hanafis the meaning of the word Qur'un in the Qur'an is "menses" (monthly course) whereas according to the Shafi'is and the Shiahs it means "purity" (from menses). . . . The primary purpose of fixing the periods for the wife who discharges her monthly course is to ascertain whether she is pregnant or not. . . .

(iv) Prescribing 90 days period for effectiveness of all kinds of divorces, including a wife, who has been divorced by her husband without consummation of marriage, is against the manifest injunction of the Qur'an and *Sunnah*.

(v) The period as prescribed in the case of a pregnant wife, is repugnant to the injunctions of the Qur'an and *Sunnah*.

(vi) The right to remarry the same husband, without an intervening marriage unless the *Talaq* is effective for three times, as provided in section 7, negatives the *talaq al-Hasan* and its effect, which is contrary to the injunctions of the Qur'an and *Sunnah*. It may be added that the effectiveness of *talaq* is not only relevant for purpose of re-marriage, but it is also relatable to the right to property such as will and inheritance. The dictate of the Qur'an and *Sunnah* must, therefore, be strictly adhered to.")

her parents. Thereafter, the case of the petitioner is that respondent No. 1 pronounced oral divorce and after completing Iddat period, the petitioner contracted second marriage with one Lal on 7-3-1990 which was duly registered. . . Thereafter, respondent No. 1 instigated the maternal-uncle of petitioner and said Lal on the basis that she was still married to respondent No. 1 and the Nikahnama with Lal is forged.<sup>104</sup>

The respondent's counsel argued that the petitioner had lied to the Family Court in order to get a favorable ruling, that she had illegally married for a second time, and that she should be dealt with as one who has violated the provisions of the Shariah which proscribe adultery. Because he never gave notice to the Chairman as prescribed by section 7 of the MFLO, the respondent argued, the *talaq* was invalid and he and the petitioner were still married. The High Court disagreed and, subverting the codified law, wrote:

There is a rebuttable presumption regarding the validity of public documents. Since the presumption has gone un rebutted, the Nikahnama stands as a genuine document and it is stated in the Nikahnama that the petitioner has entered into Nikah after being divorced. Respondent No. 2 has not properly appraised the evidence regarding pronouncement of oral *Talaq* nor has he taken into consideration the fact that the genuineness of Nikahnama of the petitioner has gone unchallenged.<sup>105</sup>

Besides reliance on the secular argument of "rebuttable presumption," the Court also relied on the "best interests of the child" standard, using the petitioner's pregnancy as just cause for finding that her second marriage was valid. The Court wrote:

[Respondents have] not taken into consideration the fact that the petitioner was pregnant during the proceedings for jactitation of marriage [the attempt to get second marriage decreed null and void]. [The appellate court] passed the impugned order setting aside the judgment of the learned Judge, Family Court and consequence of his order would be that child born to the petitioner would be considered illegitimate. In such a situation, the law leans in favour of validity of marriage and legitimacy of a child who is innocent. This consideration was totally disregarded by respondent . . .<sup>106</sup>

Rather than expose a woman to charges of adultery and her child to charges of illegitimacy, the Court reasons that the husband's declaration of *talaq*, though

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104. Mst. Batool Bibi v. Muhammad Hayat and Another, 1995 CLC 724, 725 (Pak.).

105. *Id.* at 728.

106. *Id.*

lacking notice, was nonetheless valid.<sup>107</sup> This is an example of judicial efforts to consider a litigant's particular circumstances, and in the process, to exercise independent reasoning, or *Ijtihad*.

### B. *Women Seeking Divorce and the Right of Khula'*

Having looked at the traditional regime of divorce—*talaq*—we turn to a woman's right to divorce her husband—*khula'*. "*Khula'*" is an Islamic tradition and literally means "removal or put off." It signifies the removal of the matrimonial bond.<sup>108</sup> Initiated by the wife, *khula'* is an offer a wife can make to her husband, and its effectiveness depends on his acceptance.<sup>109</sup> In essence, a wife offers to give up some financial consideration in order that her husband might agree to dissolve the marriage contract; she might give up any deferred dower not paid to her yet, give back what dower she has already received at the contract's signing, or she might give up her right to maintenance (spousal support) for the ninety-day waiting period. Upon the dissolution of marriage, a wife is under the same obligations to give notice to the Chairman, in writing, and notice to her husband. The waiting period applies, and the Chairman is required to convene an Arbitration Council within thirty days.<sup>110</sup>

Most often, a husband will refuse to accept the offer, at which point his wife has the right to seek a judicial decree of *khula'*. In order to understand the framework the judiciary is working in and around when granting *khula'* divorces, this section offers a chronological narrative of the development of the current *khula'* doctrine. After a temporally oriented glimpse at the doctrine, this section examines the judiciary's important role in crafting a common law that addresses *khula'* and offering women a way out of unhappy marriages when their husbands refuse to grant them divorces.

Judges play just as important a role today in maintaining and encouraging the 'modernization' of the society as they did in the 1960's. Yet the struggle continues between the Modernist attempt to move Pakistan towards a more secular state and the Traditionalist attempt to keep the law "pure" and to alter Hanafi doctrine with much restraint. Judges may be making "independent judgments" in the way the Marriage Commission had hoped they would, but judges will rarely acknowledge their own power to make those independent judgments. Family law, then, moves forward, surely, but the rationales for its movement are necessarily couched in religious terms.

This is the compromise that modern jurists make. They grant women divorces more easily (requiring only that they articulate their hatred or aversion towards their husband) but they often still require women to give financial consideration to their husbands. A few courts have required husbands to pursue

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107. *Id.*

108. Dissolution of Muslim Marriages Act, *supra* note 28, at 211.

109. *Id.*

110. *Id.* at 223.



financial consideration claims in separate suits, thus imposing high transaction costs to men who want consideration, but no court has said it is unilaterally not allowed.

### 1. *Khula' doctrine before the MFLO*

Traditional Hanafi law did not recognize incompatibility or “irreconcilable differences” as a ground for a wife to seek divorce, nor was it listed as a ground in the Dissolution of Muslim Marriages Act of 1939.<sup>111</sup> Under the Dissolution of Marriages Act, if a woman could not prove one of the enumerated eight grounds of fault when seeking a judicial decree of divorce, then she and her husband were trapped in an unhappy marriage.

In a swift legal maneuver in 1959, before the MFLO’s passage, the Lahore High Court changed the Islamic tradition of *khula'* into a legal, judicially determinable one. In *Balquis Fatima v. Najm. Ullkram Qureshi*, the Court wrote that a husband’s consent was no longer necessary if a wife could show incompatibility and if she would return her dower as financial consideration.<sup>112</sup> The High Court based its decision on the Qur’an II:229:

If ye (judges) do indeed fear that they would be unable to keep the limits ordained by God, there is not blame on either of them if she give something for her freedom.

The High Court interpreted that passage to mean that a judge has the power to dissolve a marriage. The Court was navigating the sea of traditional Muslim law to find a channel by which it could dole out social justice, furthering the Modernist agenda to use *Ijtihad* for social justice. As we will see, “social justice” included the project for marital and domestic happiness, for love, perhaps even for romance. While judges rarely spelled out these new ideas that are not regularly associated with Muslim marital life, one can see their roots beginning to take hold in judicial language.

### 2. *The Report and the Traditionalist response*

To the question, “Would you make incompatibility of temperament a valid ground for divorce?” the Commission wrote in 1956:

The Commission is of the opinion that incompatibility of temperament should not ordinarily be regarded as a valid ground for divorce. If a woman wants a divorce on the ground of incompatibility of temperament she should take advantage of the provision relating to *Khula*. Apart from

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111. Dissolution of Muslim Marriages Act, *supra* note 28.

112. 1959 PLD 566 (Pak.).

*Khula* we do not recommend that incompatibility of temperament should be made a valid ground for dissolution of marriage by the court.<sup>113</sup>

Elsewhere the Report states that:

the provisions of the Dissolution of Muslim Marriages Act, 1939, do not require any modification. It was also agreed that supplementary legislation may be undertaken to make the *Khula* form of *talaq* more certain and precise. About *Khula*, that is divorce sought by wife, there is a consensus of opinion that Islam has granted this right to the woman if she foregoes the *Mehr* [dowry] or a part of it, if it is so demanded by the husband.<sup>114</sup>

The Commission advocated incompatibility as a ground for divorce but insisted on the requirement for a wife to give up financial consideration. Using religion as its crutch, the Commission further wrote:

There is a universally accepted Hadith about a *Khula* case which arose between a woman of the name of Jamila and her husband Sabit Ibn-Qais. The Holy Prophet granted the divorce on the basis of extreme incompatibility of temperament only; no other accusation was made by the wife as a foundation for the demand of divorce. We are recommending that incompatibility of temperament should not give the wife a right to demand a divorce except in the *Khula*'form.<sup>115</sup>

To the same question, Maulana Maududi did not provide an answer, but instead wrote:

It is advisable that Islamic injunctions not only in regard to *Khula*', but also in regard to all matters connected with conjugal life should be codified. For this purpose a committee consisting of '*Ulama* and experienced lawyers should be constituted.<sup>116</sup>

The Commission did advocate *khula*', but it did not give any guidelines as to how to apply the doctrine. While the burden was on the wife to prove incompatibility, the Commission did not suggest any standard for that proof. The only standard available was articulated in *Balquis Fatima v. Najm. Ullkram Qureshi*, and was in and of itself fairly vague. As noted above, the High Court's most significant contribution to the doctrine was its confirmation that judges could provide women with judicially decreed divorces.

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113. THE REPORT, *supra* note 16, at 75.

114. *Id.* at 61-62.

115. *Id.* at 62.

116. Maududi, *supra* note 65, at 23.

3. *The Federal Shariat Court: setting a flexible standard for divorce and khula'*

While the secular High Court's test was set in 1959 as "incompatibility", in 1983, the Islamic Federal Shariat Court used acceptable religious language to set a clearer standard.<sup>117</sup> The Federal Shariat Court (FSC) decided that a woman has the right to *khula'* if she can show that she is unable to live with her husband "within the limits prescribed by Allah." The FSC set a clearer but looser standard that family courts could then use to grant more women divorces, a standard that secular courts latched on to (see below). In *Jan Ali v. Gul Raja*, Gul Raja filed for marital dissolution against her husband Jan Ali after learning that Ali was already married. Gul Raja argued that she had not known of Ali's first marriage. Ali filed a countersuit of restitution of conjugal rights. The Family Court held that from the outset the marriage had been marred by foul play and the spouses could not "observe the limits of God."

What the learned trial judge seems to have held is that there was no possibility of the matrimonial life being carried further because from the outset it was tainted with malafide and 'foul play.' The institution of marriage is based on mutual confidence, respect and love inter se. When it is shattered by the revelation that the husband was already married, it is bound to have serious consequences on the relationship. Second marriage is of course permissible under the law. Some people even go for second marriage even without either the consent of the first wife of the statutory sanction under Muslim Family Laws Ordinance, 1961. . . [But this] was a clear case of fraud. [Gul Raja] and her parents have been duped into this very unhappy and sacred relationship. The severity of shock that respondent No. I might have experienced on knowing that she had been made the victim of fraud by her very 'loving husband' is so apparent as to warrant any observation.<sup>118</sup>

Even though the Court admits that Gul Raja's desires for a happy marriage, love, affection, singular devotion, and attention are normal and right,<sup>119</sup> *those desires still do not give her rights to retain her dower or post-dissolution maintenance*. The Court despises the husband's behavior, but does not radically

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117. The late 1970's and 1980's saw the dictator Zia-ul-Haq's fundamentalist regime infiltrate Pakistani law. Arguably, one of his more significant steps towards "Islamization" was the establishment of a Constitutional Court: the Federal Shariat Court. The Family Courts are secular and separate from the Federal Shariat Court (FSC) and deal with any family dispute arising under the 1961 Muslim Family Laws Ordinance. However, the FSC will hear a family law suit if a precept of Islamic law is claimed to be at issue.

118. *Jan Ali v. Gul Raja*, 1994 PLD 245, 247-48.

119. *Razia Khatoun v. Muhammad Yousef*, 1987 MLD 2486, 2489 (stating "it is evident from the statement that their relations had become so strained that it would not have been possible for them to live together happily.").

change the doctrine. The FSC mocks the “loving husband,” suggesting that he is not loving at all, but that she, as a wife, rightly had expectations that he would be. As to the question of dower and maintenance, the Court writes that because Gul Raja claimed she hated her husband, she was in effect making a *khula'* claim, and as such, she must make some financial consideration. “The learned trial Judge after appraising the evidence as well as the circumstances of the case has come to a definite conclusion that respondent has fixed aversion to her husband and cannot love within the limits of God. In this view of the matter, we are afraid, we cannot substitute our own finding . . . for the factual finding recorded by the learned trial Court.”<sup>120</sup> Thus the central religious court set a surprisingly vague precedent that secular family courts have seized upon in order to grant women divorces under a *khula'* claim—a practice that continues to flourish today.

4. *The present day (1987-1998): how to define “incompatibility”?*

Modern judges are not familiar or comfortable with Islamic law or Qur'anic interpretation, having not been schooled in that doctrine. Taking their cue from the FSC, however, secular judges continue to repeat the mantra “within the limits prescribed by Allah” without ever really defining the standard. Secular courts have seized the phrase uttered by a religious court and have used it in many situations, and judges are, in the process, re-interpreting Islam. Specifically, secular courts have advanced the Modernist agenda and have brought back a liberal regime of *Ijtihad* that has enabled judges to transform the distribution of power between men and women. Judges have acted as de facto legislators, practicing *Ijtihad* just as the Marriage Commission of 1955 intended. Judges simultaneously compromise between the Traditionalists' desire for the promulgation of “Islamic law” and the Modernists' desire for social justice: they provide social justice while repeating the FSC's standard, invoking “Allah's prescribed limits” as they push slowly for a secular reading of family law.

This section identifies the ways in which courts are defining Allah's prescribed limits of behavior for married couples and expanding the definition of incompatibility. As a result of this definitional expansion, the judiciary has created a very low standard of proof of incompatibility—so much so that it rivals the West's no-fault doctrines.

a. Sexual relations

One of the “limits prescribed by Allah” is the married couple's sexual satisfaction. Stereotypes suggest that the Muslim world is a sexless one, or rather, that sex is a violent and unnatural act; however, often the opposite is true. The Muslim world places great importance on sex, both on its reproductive and

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120. *Supra* note 118, at 249.

pleasure-providing functions—for men *and* for women. In *Mir Qalam Khan v. Shamim Bibi*, the Court tried to define the married couple's limits, admitting that a woman's sexual satisfaction is an important part of her relationship with her husband.<sup>121</sup> It is not merely a part of the doctrinal duty he owes, but is part of her emotional sexual satisfaction—which, the Court admits, derives from both her ability to have children and the act of sex itself. The Court writes that where a “lady” brought a suit for marital dissolution against her husband after nine years of marriage “in the given social set-up and traditional background,” that was sufficient proof that the parties’ relationship was quite strained.<sup>122</sup> The Court begins its holding with the language of family and procreation, buffering the reader for its final thought on sexual satisfaction:

The certificate of the Medical Superintendent would suggest that the petitioner is suffering from the abnormality of spermatozoa. Obviously, his sperms [sic] were not capable of causing fertilisation. To have children and to procreate is the biological desire of a female without which she considers herself incomplete. The agony of a female would be boundless when she happens to note that the fault lies not with her but with him. This by itself was sufficient to bring about estrangement in the relationship and hence the Family Court had rightly come to the conclusion that the parties cannot live together.<sup>123</sup>

The impotency of a husband is generally taken for his inability to give emotional sexual satisfaction to that particular woman who happens to be his wife.

The Court is striking an ideological compromise: while it frames a wife's right in traditional and patriarchal terms, it nevertheless suggests that she has a right to an emotionally satisfactory sexual life.<sup>124</sup> If that right is not satisfied, then a woman cannot live with her husband as man and wife within the limits prescribed by Allah.

The Court in *Mumtaz Bibi v. Muhammad Ilyas* also responded to the standard the Federal Shariat Court had delineated.<sup>125</sup> The Court used “nature” to define Allah's prescribed limits: “The petitioner filed a suit for dissolution of her marriage with the respondent No. 1 before the learned Family Court No. XXII at Karachi. Besides pleading maltreatment at the hands of the respondent the petitioner further pleaded that she could not live with the respondent as his wife

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121. 1995 CLC 731.

122. *Id.* at 732.

123. *Mir Qalam Khan v. Shamim Bibi*, 1995 CLC 731, 732.

124. *Id.* at 732 (“In Islam, ‘Zaujain’ are the one that complement one another. The physical shortcomings of one are complemented by another and vice versa. In this complementing union, the role of giving birth is entrusted to the female. In case she had some physical disability towards procreation, it becomes a valid ground for the husband to take [a] second wife. . . . Conversely when such disability rests with the husband, the lady also should have the corresponding right to claim dissolution which should not be denied and does not run counter to any principle of either law or morality.”).

125. 1987 CLC 2323.

within the limits prescribed by nature.”<sup>126</sup> Nature’s prescribed limits suggest more strongly that sexual intercourse is central to the institution of marriage, not only because it is part of the obedience-maintenance relationship of rights and duties between husband and wife, but also because it is integral to the definition of husband and wife, perhaps independent of the symbiotic doctrinal pairing.

b. The hate standard

A second limit prescribed by Allah is a married couple’s affection for each other, or at least an absence of aversion towards each other. In *Mumtaz Bibi*, the wife had not actually made a *khula’* claim; instead, the Court read the claim into her language of hatred and aversion. The Court used a classist rationale: it understands the woman’s upper class position as proof that if she was willing to air her dirty laundry in court, her situation is serious enough to warrant a divorce decree. But note that this right only belongs to “that particular woman who happens to be his wife.”<sup>127</sup> Using the language of fault, the Court emphasized that the dissolution of marriage in this case is the husband’s fault, and where fault lies with him, the wife then has a right to seek marital dissolution. Courts often determine that a woman’s failure to bring a *khula’* claim does not bar her from making it, either in a separate suit after the fact, or orally at the same hearing. If a woman does not include a *khula’* claim in her complaint alleging incompatibility, a court will sometimes issue her a divorce on the basis of such a claim regardless. (In *Mumtaz Bibi*, the Court saw that it was the easiest way to terminate her marriage.)

Courts often issue decrees for *khula’* anyway for a mere showing or indication of hatred in response to women who cannot meet the burden of proof when they bring divorce suits on fault grounds enumerated by the Dissolution of Marriages Act. The Court in *Mst. Nazir v. Additional District Judge Rahim Yarkhan* wrote,

It is argued on behalf of the petitioner that if a wife fails to prove cruelty or adultery, she is still entitled to the decree of dissolution of marriage on the ground of ‘*Khula’*.’ The petitioner in the instant case had categorically stated that she has developed extreme hatred towards the respondent and she cannot live with him within the limits set by Almighty Allah and her statement alone to this effect was sufficient and she was entitled to the grant of decree for dissolution of marriage on the basis of ‘*Khula’*.’<sup>128</sup>

*Khula’* is an Islamic form of divorce on the basis of physical aversion, a “state of mind” standard that has a very slight burden of proof. In fact, a mere

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126. *Id.* at 2324.

127. Mir Qualam Khan, 1995 CLC at 734.

128. 1995 CLC 296, 298.

positive statement of hatred is enough for some judges. In *Mst. Saiqa v. The Judge, Family Court, Lahore*, the petitioner/wife failed to make that positive statement and the High Court denied her appeal for a divorce decree.<sup>129</sup> Mst. Saiqa married Khalid Iqbal, the two had a son, and the couple began having marital trouble. Iqbal's brother made indecent overtures towards Saiqa, and when Saiqa told Iqbal, he advised her to succumb to his brother. Saiqa sued her husband on the grounds of cruelty, misappropriation of the dowry, and *Khula'*. Iqbal in turn sued for restitution of conjugal rights, and the suits were consolidated. The trial court found that Saiqa had failed to prove any of the grounds for divorce, and the appellate court dismissed her appeal. The High Court held that the marriage could not be dissolved in this case, but the Court lowered the bar of proof for *Khula'* claims generally. The Court wrote:

There is nothing on the record to prove that it was not possible for the parties to live together as husband and wife. *While appearing as her own witness, the petitioner did not make a positive statement to that effect.* In cross-examination, she stated that the only reason for strained relations between her and her husband was the attitude of the brother of [her husband].

As already observed, the real sister of the petitioner is married to the brother of [petitioner's husband] and is living with her husband happily. The marriage between the parties has been blessed with a child.<sup>130</sup>

The Court's opinion in Saiqa had a double effect. While it denied Saiqa a decree of marital dissolution, it struck a compromise: it enunciated a low threshold of proof for *Khula'*—a mere positive statement of hatred—and provided other women the opportunity to avail themselves of the low threshold of proof. At the same time though, the Court compromised, tightening the cord around women's wrists after realizing it might have loosened it too much: it found that *Khula'* was inappropriate where there was not any discord between the other couple. Saiqa's sister was married to Iqbal's brother, and ties between two families, important in a feudal (status-based) system, did not escape the new "liberal" judiciary.

On the other hand, a year later in 1995, the Lahore High Court held that a woman plaintiff, whose sister had married and divorced the plaintiff's husband's brother, could nonetheless divorce her husband on *Khula'* grounds because her aversion to him stemmed from her aversion to his brother. The Court held that "in these circumstances refusal to grant *Khula'* would tantamount for forcing [sic] the parties to live in a hateful union which would be contrary to all norms of justice."<sup>131</sup>

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129. 1994 MLD 2204.

130. *Id.* at 2206-07.

131. *Mst. Razia Begum v. District Judge, Jhang*, 1995 CLC 657, 659.

*Mst. Ghulam Zohra v. Faiz Rasool* set an even lower standard for women to meet when asking for a judicial decree of *khula'*, holding that a woman's failure to affirmatively state her aversion to her husband would not necessarily be fatal to her *khula'* claim.

Had the learned Courts cared to examine the statement which she had made at the trial they would have noticed that she had no liking whatsoever for her husband. May be [sic] her aversion for her husband emanated from causes not very substantial but then considering the personal nature of the relationship between the parties, we are more concerned with her state of mind than with the basis thereof. There is no reason to believe whatsoever that the feelings which she had expressed about the husband in her deposition were not a true reflection of the state of her mind.<sup>132</sup>

The Court cites *Rashidan Bibi v. Bashir Ahmad*, where that Court wrote:

If a woman states that she would not live with her husband even if she was shot with a bullet and there after the reconciliation attempts by the Judge Family Court fail, it is sufficient to satisfy the conscience of the Judge Family Court that the two parties could certainly not live together within the limits prescribe by God and consequently in such circumstances the woman is entitles to get the marriage dissolved on the basis of '*Khula*'. The principle of '*khula*' is based on the fact that if a woman has decided not to live with her husband for any reason and this decision is firm, then the Court, after satisfying its conscience that not to dissolve the marriage would mean forcing the woman to a hateful union with the man, and it is not necessary on the part of the woman to produce evidence of facts and circumstances to show the extent of hatred to satisfy the conscience of the Judge, Family Court or the Appellate Court. If a woman had stated that she would rather prefer to be shot dead than to go and live with her husband, it obviously means that she is determined not to live with her husband, it obviously means that she is determined not to live with her husband and the hatred was so deep that not dissolve such a marriage would amount to compelling her or rather pushing her in a hateful union with the husband which certainly is not contemplated by the law i.e., dissolution of marriage on the basis of '*Khula*'.<sup>133</sup>

Other courts have set even lower standards, emphasizing that a woman can repudiate her husband for any reason without actually meeting a strict "hate" standard. The Court in *Aftab Ahmad v. Tahira Yasmeen* emphasized that the wife proved that she was "fed up with her husband," "that she wanted to get rid of

132. *Mst. Ghulam Zohra v. Faiz Rasool*, 1988 MLD 1353, 1355.

133. *Id.* (emphasis added) (citing *Rashidan Bibi v. Bashir Ahmad*, 1983 PLD 549).



him,” “had developed a strong disliking,” and therefore it was impossible for them “to live peacefully.”<sup>134</sup> In fact, some courts have ruled that a woman does not even have to specify the reasons for her aversion; she need only to state that she feels aversion and that reconciliation is not possible.<sup>135</sup>

### c. Financial consideration

Pakistan’s courts essentially created a new right of divorce for women to take advantage of, but not without making a significant compromise to please Traditionalists: a woman has to essentially give back her money in order to get a *khula’* divorce—a sign not only that she is paying for doing something undesirable but also that she has to pay for her individual rights.<sup>136</sup> An important aspect of the Dissolution of Marriages Act was that a woman’s financial claims against her husband (payment of the full dower and maintenance during the ninety day waiting period) were not affected by bringing a divorce case on one of these eight grounds, but in contrast women do not have this right under a *khula’* theory of divorce.

However, it is important to note that judges sometimes practice *Ijtihad* liberally. Courts are now granting women divorces yet leaving the money out of the consideration, holding that if a husband wants financial consideration, he can sue his former wife in a separate civil proceeding. Judges are putting the burden on the husband to go after the money, giving him higher transaction costs. Simultaneously, judges are making it easier for women to obtain single status, moving towards creating a rule similar to *talaq*, which is still effective even if a husband has not returned his wife her properties or has not paid her the deferred dower.<sup>137</sup> Judges are not forcing women to pay for their happiness.

Where courts entertain the question of financial consideration along with the *khula’* claim (in contrast to ordering the consideration claim to be pursued in a separate civil suit), they often put the burden on a man to prove that indeed a dower (or portion of it) was paid to his wife. A man has to prove that his wife received any benefits which she should return as a matter of evidence, and if he can show she did receive benefits, he must specify what those benefits were in his petition or counter-complaint.

The Court in *Allah Ditta v. Judge Family Court*<sup>138</sup> found that the trial court had correctly granted Mst. Mumtaz Bibi a divorce on the basis of unconditional *khula’* where her husband contracted a second marriage without her permission. The Court recognized that such behavior on a husband’s part would naturally incite aversion or hatred, and that hatred is given legal weight. In perhaps some of the most important language used in Family Law cases, the Court writes,

134. Aftab Ahmad v. Tahira Yasmeen, 1992 CLC 2345, 2347.

135. Shakila Bibi v. Muhammad Farooq, 1994 CLC 230.

136. Lucy Carroll, *Qur'an 2:220: 'A Charter Granted to the Wife'? Judicial Khul' in Pakistan*, 3 ISLAMIC LAW AND SOCIETY 91 (1996).

137. PATEL, *supra* note 78, at 200.

138. 1995 MLD 1952.

Such conduct of the husband towards the wife certainly breaks her heart if not the bones and when heart is broken it is simply immaterial if the bones are intact ....There being no cogent evidence about the passing of consideration, respondent No. 2 has rightly been granted the unconditional *Khula'* divorce.<sup>139</sup>

The Court does three interesting things here: it uses the language of love ("broken heart"); it separates a marriage's loving function from its "bones," or its legal validity; the Court also strengthens the common law rule that a woman does not always have to agree to give up some consideration, that is, whatever dower and gifts she may have received from husband.<sup>140</sup>

In *Allah Ditta*, there was not any evidence that Mumtaz Bibi had offered any consideration in return for her *khula'* decree, but the Court determined that whether or not Mumtaz Bibi had offered consideration she was entitled to divorce because of the circumstances that broke her heart. In examining *Allah Ditta*, the suspicion exists that the Court's motives behind its leniency towards her may have been its aversion to polygamy. But it and other courts still use language that helps change the definition of marriage.

At times, a statement of hatred on the wife's part is sufficient to grant her a divorce; she does not have to promise to give anything up. In *Mst. Shazia Nasim v. Additional District Judge*, the Court decided that a mere statement of hatred is sufficient. Shazia Nasim's husband argued that in return for *khula'* she should return the gold ornaments he claimed to have given her during marriage.<sup>141</sup> But, the Court stressed, his claim had no weight since he had not produced any evidence that the gold ornaments he claimed to have given her were even made of gold, and even if they were, the Nikahnama did not list them as part of the dower. If a husband has not submitted any evidence of money or objects given to his wife during their marriage, he has no right to claim them.<sup>142</sup> "[I]n the absence of any proof of receipt of benefits by the wife from the husband, the wife would be entitled to the grant of 'Khula'" without restoration of such unproved benefits."<sup>143</sup> Even where certain items are listed in the Nikahnama (unlike the situation in *Mst. Shazia Nasim* above) the husband bears the burden to prove that in fact his wife received the dower (or some part of it). The Court in *Muhammad Rafique v. Mst. Zubaida Bibi* wrote:

[V]ide judgment dated 8-11-1990 the marriage between the parties was dissolved on the basis of *Khula'*, with the direction that she was to

139. *Id.* at 1853.

140. Remember one of Traditionalist Maulana Maududi's own rationales for supporting polygamy: love and marital bliss. It is curious that the modern judiciary uses the same rationale for a different end.

141. 1995 MLD 981.

142. See, e.g., *Mst. Nazir v. Additional District Judge Rahim Yarkhan*, 1995 CLC 296; *Bashir Ahmad v. Family Court*, 1993 CLC 1126.

143. *Mst. Nazir v. Additional District Judge Rahim Yarkhan*, 1995 CLC 296, 298.

relinquish her claim of dower money and past maintenance. . . Before the learned Additional District Judge, the petitioner [husband] raised the contention that he had given to respondent No. 1 golden ornaments weighing two and a half tolas in lieu of dower and she was also liable to return the same in lieu of *Khula'*. This plea was not accepted.

. . . [At the *Khula'* hearing it was contended that the ornaments] were given to respondent No. 1 in lieu of dower [and that] stood proved from the Nikahnama [which was entered into evidence]. . . .

In my view, this writ petition must fail. It was for the petitioner to prove by producing unimpeachable evidence that he had given two and a half tolas . . . . It is true that in the Nikahnama there is a mention of this fact, but this entry, per se, cannot be relied upon . . . . In the absence of evidence to prove the factum of delivery of two and a half tolas . . . it cannot be said that such ornaments were, in fact, handed over to her.<sup>144</sup>

Again, the traditional rule is that a woman can receive a *khula'* decree only if she gives up any benefits she received from her husband. In 1995, *Mst. Farida Begum v. Muhammad Ashraf* definitively articulated the rule that had been oft-repeated in the years before: "Established legal proposition is that in case of claim of dissolution of marriage on the principle of *Khula'* by the wife she is bound to return the benefits which she may have received from her husband. Claim to receive benefits in future [maintenance] also shall have to be relinquished in case the wife claims dissolution of marriage on the ground of *Khula'*."<sup>145</sup> Granted, courts are doing something revolutionary: even where a term is specified in the marriage contract for consideration for *khula'*, and a wife fails to fulfill her obligation, a court may grant *khula'*.

If a husband grants *khula'* to his wife in reliance on an agreed consideration, and she fails to fulfill her obligation after the divorce is effective, courts have ruled that her failure does render the divorce ineffective. The Court wrote in *Mst. Zubeda v. Muhammad Akram*:

The facts leading to the filing of the above petition are that the petitioner is the first wife of the respondent No. 1 and has six children from him. It is alleged that in January, 1983, the respondent No. 1 contracted second marriage and on 8-1-1983 he executed Iqramama wherein he agreed to pay 1,000 per month as maintenance to her and children and also gave House No. A534/4, situated at Jalalabad, but he failed to comply with the Iqramama and was not paying her maintenance. The petitioner filed two suits against the respondent No. 1 . . . for dissolution of marriage and for maintenance. The respondent No. 1 filed, against the petitioner for conjugal rights.

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144. Muhammad Rafique v. Mst. Zubaida Bibi, 1993 CLC 704, 705-6.

145. Mst. Farida Begum v. Muhammad Ashraf, 1995 CLC 440, 443.

. . . Judge Family Court dissolved the marriage by way of *Khula'* subject to the condition that *Khula'* will be effective after returning the house to the respondent No. 1. The petitioner having been aggrieved has filed the present petition. . . .

I have heard the learned counsel for the parties and perused the impugned judgment and decree passed by the family Judge. I am of the opinion that the non-fulfillment will not render the decree dissolving marriage on the basis of *Khula'* as ineffective because imposition of conditions merely create a civil liability and the decree for the dissolution of the marriage passed by way of *Khula'* cannot be considered as dependent on requiring the wife to fulfill the condition first. I am fortified in my view by the Judgment in the case of *Dr. Akhlaq Ahmed v. Mst. Kishwar Sultana and others* PLD 1983 SC 169. The Hon'ble Supreme Court held once the Family Court come to the conclusion that the parties cannot remain within the limits of God and the dissolution of marriage by *Khula'* must take place, the inquiry into the terms on which such dissolution shall take place does not affect the conclusion but only create civil liability with regard to the benefits to be returned by the wife to the husband and does not affect the dissolution itself.

I am of the opinion that the mere non-payment of stipulated consideration or nonsurrendering of the house for *Khula'* does not invalidate the dissolution of marriage by *Khula'* as contended by the learned counsel for the petitioner.<sup>146</sup>

In addition, the Lahore High Court in *Dr. Akhlaq Ahmad v. Mst. Kishwar Sultana*, (cited in *Zubeda*, above), determined that "non-payment of stipulated consideration for *Khula'* does not invalidate the dissolution of marriage by *Khula'*" but instead only creates a civil liability.<sup>147</sup>

### C. *Talaq versus Khula'*

Courts are split as to whether a woman's right to *khula'* is equal to (as powerful or legally enforceable as) a man's unilateral right to *talaq*. Some courts hold that a man has an unrestricted right to repudiate his wife while a woman has to satisfy a court of law that the marriage has irretrievably broken down.<sup>148</sup> These courts do not consider the right of *khula'* equal to that of *talaq*. The Court in *Muhammad Abbasi v. Mst. Samia Abbasi* wrote:

There cannot be any cavil that a wife is entitled to have the marriage dissolved on the basis of *Khula*, if the conscience of the Court is satisfied that it shall not be possible for the parties to live together as husband and

146. *Mst Zubeda v. Muhammad Akram*, 1988 MLD 2486, 2487.

147. *Dr. Akhlaq Ahmad v. Mst. Kishwar Sultana*, 1988 CLC 1135.

148. *E.g.*, *Muhammad Abbasi v. Mst. Samia Abbasi*, 1992 CLC 937.

wife within the limits prescribed by Allah Almighty. It is, however, to be remembered that *Khula* cannot be granted to the wife just for asking and it cannot be equated with the right of [the] husband to dissolve the marriage by pronouncing *Talaq*. The grant of *Khula*, as already observed, is dependent upon the satisfaction of the Court that refusal would amount to forcing the parties to live in a hateful union.<sup>149</sup>

But other courts, like the one in *Muhammad Yasin v. Rabia Bibi*, hold that “[j]ust as a husband is given the right to pronounce ‘*talaq*’ on his wife, in the same way a wife has a right to get the marriage dissolved on the basis of *khula*’ if she could satisfy the conscience of the court that she did not want to live with her husband and that she was prepared to return the benefits.”<sup>150</sup> The Court’s reference to a court’s conscience is more standard-like and less rule-based. And, as shown earlier, most courts have allowed their “judicial consciences” to be satisfied very easily, and as a result, those courts have encouraged *talaq* and *khula*’ to be equally powerful rights. But while the courts equalize the rights of *talaq* and *khula*’, they have also left uncertainty as to the exact standard of a court’s conscience, which will obviously vary from court to court.

Thus the tension between secular and religious, between modern and traditional, is clear. The modern judge fights an internal battle: his affiliation with and affection for his female litigants (paternalism/love) versus his desire to shun “Western” ideas which have been grafted onto Pakistan’s family laws. He gives some rights and opportunities but he takes others away by resorting to Islamic signals and symbols—something most judges really are not used to doing.

Overall, the new trend in *khula*’ law gives women a great deal of power. The most important difference between *talaq* and *khula*’ may be that a wife has to seek a judicial decree. This is also the target of most feminist critique of the doctrine. However, the difference may not be that important in practice. It may not matter that the *khula*’ process may take longer than saying *talaq* 3 times, either in one sitting or over the period of 3 tuhrs. In the context of a traditionally lopsided universe of options, the right of *khula*’ and its judicially determined permutations are enormous improvements in the choices women have.

## VI. CONCLUSION

This paper has been an attempt to examine doctrinal shifts in Pakistani divorce law. The last fifty years have seen the judiciary take on a kind of legislative role as it redefines divorce, the rights a woman has to divorce, and the

149. *Id.* at 940 (relying on *Muhammad Yasin v. Mst. Razia Begum* and another, 1986 CLC 1996, which held that “It is correct that *Khula*’ cannot be allowed on the mere asking of a wife. She can only succeed if she proves to the satisfaction of the judicial conscience of the court that there exists an irremediable breach between the parties which makes it impossible for her to perform her part of [the] contract within the limits prescribed by God Almighty.”).

150. *Muhammad Yasin v. Rabia Bibi*, 1983 PLD Lah. 377.

methods by which she can preserve those rights. In the process, courts have created a common law "hate standard" doctrine, by which a woman can be granted a divorce by merely articulating the words "I hate him."

Divorce is only one area in which courts are creating common family law doctrine. Although a Muslim Family Law Ordinance was passed in 1961 codifying traditional Islamic family law to a large extent while providing procedural reforms, the modern judiciary has been straying from the document's four corners in order to expand women's universe of rights and create and preserve "social justice." At the same time, the modern judiciary must contend with traditionalist forces that want to apply family law as codified in the Ordinance or in the alternative, to apply strict traditional Hanafi doctrine.

Part II provided a brief overview of Islamic legal theory in order to shed light on the complexity of the theory. It is precisely this complexity that led the British colonial administration to essentialize and reduce what was a varied practice of Islamic law into a monolithic, and thus seemingly immutable, body of law. Part III examined the English colonial impact on the definition of Islamic law and Muslim family law, as well as the subsequent process of Pakistan's partition from India in 1947. Part IV outlined the ideological struggle between Modernists and Traditionalists over the idea of the immutability of the law that the British helped create.

I have tried to show that the central battle has been over the definition and application of *Ijtihad*, or "independent reasoning." The issue can be reduced: does the judiciary have the power to interpret the law and apply it on a case-by-case basis, or is the law immutable? That struggle or tension is central to the series of compromises between ideologies that those interested in the project of modernization have made and continue to make. Those compromises included the Marriage Commission's Report of 1956, which carved out new rights for women through procedural safeguards but did not go so far as to make certain acts (such as polygamy) illegal. The Report's suggestions were only partially incorporated into the Muslim Family Law Ordinance of 1961, yet another compromise. Today, judicial application of the Ordinance to individual litigants is a form of compromise, as strict application of the code often turns into a more flexible case-by-case decision of how closely to follow the code. Part V focused on current Pakistani divorce law, arguing in particular that it is not as medieval as many have described it.

The tensions and arguments between Modernists and Traditionalists are still powerful today. Modernists' agenda for social justice through a broad and liberal understanding and application of *Ijtihad* battles against Traditionalists' agenda for a legal system based on a limited understanding and application of *Ijtihad*. The two groups argued over the terms in the Marriage Commission's Report and the reforms in the Muslim Family Law Ordinance. They still battle over judicial decisions involving a host of issues, although this paper only covered *talaq* and *khula'* in any depth.

Remember the Traditionalists' aversion to family law reform through legal devices and their preference for change through social custom and convention. The Traditionalists' recipe for reform in family laws is not easily swallowed by Modernists. While Traditionalists claim that "prime importance should be given to the proper emancipation of our women-folk," freedom without question "must be on the lines envisaged by Islam and not in the emulation of the West . . . . It is the duty of the Muslim society to break the shackles of cultural servitude and carve out its own destiny. We have to fight the western and other alien influences and revive the pristine purity of Islam."<sup>151</sup> The Traditionalists do not believe legal reform can deliver women their proper emancipation, conceding that everything cannot be done by the iron rod of law. Instead, customs and conventions, too, must mold a fair society. In addition, women's education and the "[e]xtension of women's social activities within the limits of purdah [are] also essential. Establishment of women's parks, zanana clubs, and such other institutions is a great need of our society."<sup>152</sup>

Can these sorts of measures - parks and clubs - give women the "freedom" they deserve? That depends on how freedom is defined. While the purpose of this paper is not to evaluate whether Western models of emancipation for women are proper, better, or worse than Muslim models, that question is at the heart of the answer to the original question posed to the Marriage Commission, once again: "Do the existing laws . . . require modification in order to give women their proper place in society according to the fundamentals of Islam?"<sup>153</sup>

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151. Ahmad, *supra* note 57, at 234.

152. *Id.* at 234.

153. THE REPORT, *supra* note 16 at 37.

